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BRIEF FOR APPELLEE ON MOTION TO DISMISS APPEAL.

Supreme Court of the United States.

OCTOBER TERM, 1905.

No. 893.

THE COMMONWEALTH OF KENTUCKY, Appellant,

vs.

CALEB POWERS, Appellee.

Appeal from the Circuit Court of the United States for the Eastern District of Kentucky.

F. C. HUNNEMANN PRESS, LOUISVILLE, KY.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 393.

COMMONWEALTH OF KENTUCKY, . . . *Appellant,*

vs.

CALEB POWERS, ... *Appellee.*

BRIEF FOR APPELLEE ON MOTION TO DISMISS APPEAL FOR WANT OF JURISDICTION.

The above entitled proceeding is an appeal from an order of the United States Circuit Court for the Eastern District of Kentucky, made and entered on July 7, 1905, in the case of Commonwealth of Kentucky vs. Caleb Powers, granting and directing the issual of a writ of *habeas corpus cum causa*, commanding the jailer of Scott County, Kentucky, to deliver (for trial in said United States Circuit Court) the said Caleb Powers into the custody of the marshal of said United States Circuit Court; said order having been made after the said Caleb Powers had filed in the Scott Circuit Court (Kentucky), where said cause

was pending for trial, his petition for the removal of said cause, for trial, into said United States Circuit Court, under Section 641, Revised Statutes of the United States, and after all the requisite steps for such removal had, under said section, been made and taken by said Caleb Powers.

The statement of facts accompanying the above-named motion sets forth in detail every step taken by the appellee and appellant in relation to said removal of said cause into said United States Circuit Court, from the time of the filing of the petition for removal in the said Scott Circuit Court until the appeal herein was taken by appellant from the order of the said United States Circuit Court. Said statement of facts also sets forth all the material facts relating to said prosecution in the courts of Kentucky, including said Scott Circuit Court.

The question raised by said motion is whether an appeal is allowed from said order of said United States Circuit Court.

Section 641, Revised Statutes of the United States, is composed of the following acts:

The Act of March 3, 1863, Chapter 81, Section 5, 12 Stats. 756; Act of April 9, 1866, Chapter 31, Section 3, 14 Stats. 27; Act of May 11, 1866, Chapter 80, Sections 3 and 5, 14 Stats. 46; Act of May 31, 1870, Chapter 114, Sections 16 and 18, 16 Stats. 144.

The above acts were followed by the Act of March 3, 1875, Chapter 137, 18 Stats. 470. This last act is composed of ten sections. The latter part of Section 5 provides:

> "But the order of said Circuit Court dismissing or remanding said cause to the State court shall be reviewable by the Supreme Court on writ of error or appeal, as the case may be."

Before the provision last quoted was enacted it was held by the Supreme Court that no writ of error was allowable to reverse the action of the Circuit Court in refusing to take jurisdiction of a case removed to that court. The Chicago & Alton R. R. Co., Plaintiff in Error, vs. Henry C. Wiswall, 90 U. S., 23 Wall. 507 (23 L. Ed. 103). This case arose in a State court of Illinois and was removed to the United States Circuit Court. Subsequently the Circuit Court decided it had no jurisdiction of the case and made an order remanding it to the State court. To reverse the order a writ of error was procured from the Supreme Court. The writ of error was submitted January 18, 1875, and decided February 1, 1875. The court, in an opinion by Chief Justice Waite, said:

> "The writ of error in this cause is dismissed upon the authority of Ins. Co. vs. Comstock, 16 Wall. 270 (83 U. S. XXI, 498). The order of the Circuit Court remanding the cause to the State court is not a 'final' judgment in the action, but a refusal to hear and decide. The remedy in such a case is by *mandamus* to compel action, and not by writ of error to review what has been done. King vs. Justices of Gloucestershire, 1 Barn. & Ad. 1; Chitty Gen. Pr. 736; *Ex parte* Bradstreet, 7 Pet. 647; *Ex parte* Newman, 14 Wall. 165 (81 U. S. XX, 879)."

This decision doubtless caused Congress to insert the above quotation in the Act of March 3, 1875.

In Hoadley, Appellant, vs. San Francisco, 4 Otto, 4 (24 L. Ed. 34), the opinion was by Chief Justice Waite. This was an action commenced by Hoadley before the Act of March 3, 1875, namely, January 5, 1870, and was brought in the State court to quiet his title to certain lands. After the passage of the Act of March 3, 1875,

Hoadley removed his suit to the United States Circuit Court for the District of California, alleging that it was one arising under the Constitution and laws of the United States. The Circuit Court entered an order remanding the case to the State court. From that order an appeal was taken to the Supreme Court. The Supreme Court, in disposing of that appeal, on December 11, 1876, in an opinion by Mr. Chief Justice Waite, said in speaking of the quoted provision of the above act:

> "This is a modification of the previous legislation upon this subject, under which it was held, in Ins. Co. vs. Comstock, 16 Wall. 270 (83 U. S. XXI, 498), and R. R. Co. vs. Wiswall, 23 Wall. 508 (90 U. S. XXIII, 103), 'that the remedy in such a case is by mandamus to compel action, and not by writ of error to review what has been done.' We have therefore jurisdiction of this appeal, but we are clearly of the opinion that the Circuit Court did not err in remanding the case. The questions involved did not arise under the laws of the United States."

In Life Association, Appellant, vs. Runnell, 13 Otto (103 U. S. 222, 26 L. Ed. 338), decided January 24, 1881, the Supreme Court reversed the action of the United States Circuit Court remanding a case to the State court for trial, in the following language:

> "The order of the Circuit Court remanding the suit is therefore reversed, and the record remanded to that court with instructions to proceed according to law, as with a pending suit within its jurisdiction by removal."

Whether an appeal was the right remedy in this case was not raised.

In Babbitt vs. Clark, 13 Otto, 103 U. S. 606 (26 L. Ed. 507), it was insisted that the Supreme Court had no jurisdiction—

"1. Because an order of the Circuit Court remanding the case to the State court on the ground that the petition for its removal from that court had not been presented in time, is not reviewable here, either on writ of error or appeal. 2. Because, if reviewable at all, this case should have been brought here by writ of error rather than appeal; and, 3. Because the value of the matter in dispute does not exceed five thousand dollars."

The court, by Chief Justice Waite, said:

"Before the Act of 1875, 18th Stats. at Large, 470, Chapter 137, we did hold that an order of the Circuit Court remanding a case was not such a final judgment or decree in a civil action as gives jurisdiction for its review by writ of error or appeal. The appropriate remedy in such a case was, then, by mandamus to compel the Circuit Court to hear and decide. Railroad Co. vs. Wiswall, 23 Wall. 507 (90 U. S. XXIII, 103); Ins. Co. vs. Comstock, 16 Wall. 270 (83 U. S. XXI, 498); but the fifth section of the Act of 1875, provides that if it satisfactorily appears to the Circuit Court that a suit has been removed from a State court which does not really and substantially involve a controversy properly within the jurisdiction of the Circuit Court, it may be remanded, and the order to that effect shall be reviewable by this court 'on writ of error or appeal, as the case may be.'"

The court held that it had the right to review the order remanding the case, and that it had a right to such review

without regard to the pecuniary value of the matter in dispute; and on the question as to whether the case should go to the Supreme Court by writ of error or appeal, it said:

> "Congress evidently intended that orders of this kind made in suits at law should be brought here by writ of error, and that where the suit was in equity an appeal should be taken. That is the fair import of the phrase 'writ of error or appeal as the case may be.' This was a suit at law and consequently should have been brought up by a writ of error. There seems to have been very little attention paid to this distinction heretofore, and we now find that we have often considered cases on writ of error that ought to have been presented by appeal, and on appeal when the proper form of proceeding would have been by writ of error. No objection was made, however, at the time, and we did not ourselves notice the irregularity. Without deciding whether we would reverse the order of a Circuit Court if objection were made when the case was brought up in a wrong way, we are not inclined to delay a decision on the merits in this case, because of the irregularity which appears, as we think the suit was properly remanded, and the order to that effect should be affirmed."

The cases of B. & O. Railroad Co., and others, Plaintiffs in Error, vs. Koontz, etc., 14 Otto, 5 (26 L. Ed. 643), were brought in a State court of Virginia under a statute of that State, to recover damages for the deaths of a number of persons by alleged wrongful acts of the company. On the 2d of September, 1876, the company filed its petition in the State court for removal of the cases to the United States Circuit Court for the Western District of Virginia,

on the ground that the company was a citizen of Maryland, and the several plaintiffs citizens of Virginia. The several plaintiffs answered these petitions denying the company was a citizen of Maryland and claiming it was a citizen of Virginia. After hearing, the State court refused to recognize the removal, holding that the railroad company was a citizen of Virginia. To that ruling of the State court exceptions were taken. Copies of the records in the State court were never entered in the United States Circuit Court. All the cases proceeded to trial in the State court and judgment was given in each case for the plaintiff. All these judgments were carried to and affirmed by the Supreme Court of Appeals of the State. A writ of error was sued out of the Supreme Court, directed to the said Court of Appeals in each case. All of these writs were disposed of in the same opinion, filed October 31, 1881. The Supreme Court held that the said Court of Appeals erred in holding that the removal of the suits was properly refused, and then disposed of the following question: Whether the railroad company can claim a reversal, since it did not appear in the United States Circuit Court and enter copies of the records in that court, as provided by the removal act. The court held that:

> "The petitioning party has the right to remain in the State court under protest and rely on this form of remedy if he chooses, or he may enter the record in the Circuit Court and require the adverse party to litigate with him there, even while the State court is going on. * * * When the suit is docketed in the Circuit Court the adverse party may move to remand. If his motion is decided against him, he may save his point on the record and, after final judgment, bring

the case here for review, if the amount involved is sufficient for our jurisdiction. If, in such a case, we think his motion should have been granted, we reverse the judgment of the Circuit Court and direct that the suit be sent back to the State court to be proceeded with there as if no removal had been had. If the motion to remand is decided by the Circuit Court against the petitioning party, he can at once bring the case here by writ of error or appeal for a review of that decision, without regard to the amount in controversy. Babbitt vs. Clark, 13 Otto, 606 (26 L. Ed. 507). If, in such a case we reverse the order of the Circuit Court to remand, our instructions to that court are, as in Relfe vs. Rundle (13 Otto, 222, 26 L. Ed. 337), to proceed according to law as with a pending suit within its jurisdiction by removal. Should the petitioning party neglect to enter the record and docket the cause in the Circuit Court in time, we see no reason why his adversary may not go into the Circuit Court and have the case removed on that account. This being done, and no writ of error or appeal to this court taken, the jurisdiction of the State court is restored and it may rightfully proceed as though no removal had ever been attempted. * * * Now the question arises, whether, if the petitioning party is kept by his adversary and against his will in the State court, and forced to a trial there on the merits, he may, after having obtained in the regular course of procedure a reversal of the judgment and an order for the allowance of the removal, enter his cause in the Circuit Court, notwithstanding the term of that court has gone by during which, under other circumstances, the record should have been entered. We have no hesitation in saying that in

our opinion he can. As has been already seen, the jurisdiction was changed from one court to the other when the case for removal was actually made in the State court. The entering of the record in the Circuit Court after that was mere procedure, and in its nature not unlike the pleadings which follow service of process, the filing of which is ordinarily regulated by statute or rules of practice."

In Hoard, etc., *ex parte*, 15 Otto, 105 U. S. 578 (26 L. Ed. 1177), the Chesapeake & Ohio R. R. Co. began a suit in a State court of West Virginia to appropriate lands for the use of its road. The company filed a petition in the State court under the Act of March 3, 1875, to remove the suit to the District Court of the United States for the District of West Virginia, having Circuit Court powers. After the petition was filed and security given, a copy of the record was filed in the District Court and the case docketed there. Thereupon the defendants moved the United States Court to remand the case, which was denied. Thereupon such defendants, as petitioners in the Supreme Court, asked for a writ of mandamus, requiring the District Court to grant their motion. The court said:

"Before the Act of 1875, it was held in Ins. Co. vs. Comstock, 16 Wall. 270 (83 U. S. XXI, 498), followed in Railroad Co. vs. Wiswall, 23 Wall. 508 (90 U. S. XXIII, 104), that if a Circuit Court refused to take jurisdiction of a suit which had been properly removed, the remedy was by *mandamus* from this court 'to compel the Circuit Court to proceed to a final judgment or decree,' and not by writ of error or appeal. This was on the authority of *Ex parte* Bradstreet, 7 Pet. 647, in which Chief Justice Marshall delivered the opinion.

No case can be found, however, in which a *mandamus* has been used to compel a court to remand a cause after it has once refused a motion to that effect. The distinction is obvious. An order remanding a cause is not a final order or decree, from which ordinarily an appeal or writ of error can be taken; and Chief Justice Marshall, in *Ex parte* Bradstreet, gave as a reason for allowing the *mandamus*, 'That every party has a right to the judgment of this court in a suit brought by him in one of the inferior courts of the United States, provided the value of the matter in dispute exceeds the sum or value of two thousand dollars'—now, of course, five thousand dollars. If the cause is retained it may go to final judgment or decree, and the reason assigned for the *mandamus* in case of dismissal does not exist. If improperly retained and the objection is presented on the record, the question may be brought here for review after final judgment, if the amount involved is sufficient to give us jurisdiction. We so held at this term in R. R. Co. vs. Koontz [*ante*, 643]. It is of no importance that the value of the matter in dispute may be less than five thousand dollars. Jurisdiction has been given to the Circuit Court to determine whether the cause is one that ought to be remanded. The Act of 1875 has given an appeal or writ of error to this court for the review of orders to remand without regard to the amount involved. Babbitt vs. Clark [*ante*, 507]. The same remedy has not been given if the cause is retained. It rests with Congress to determine whether a cause shall be reviewed or not. If no power of review is given, the judgment of the court having jurisdiction is final. *Ex parte* Detroit Ferry Co., decided at this term [*ante*, 815].

"It is an elementary principle that a *mandamus* cannot be used to perform the office of an appeal or a writ of error. *Ex parte* Loring, 94 U. S. 419 [XXIV., 165]."

See Turner, and others, Appellants, vs. Railway & Trust Co. 16 Otto, 106 U. S. 552 (27 L. Ed. 273). This was a suit commenced in 1874, in the State court, asking a decree for the foreclosure of several mortgages covering the said railroad's property and franchises. The Farmers' Loan & Trust Co. appeared and answered, and later filed a petition and bond for the removal of the suit into the Circuit Court of the United States for the Southern District of Illinois, and thereafter the State proceeded no farther. A transcript of the proceedings was filed in the United States Circuit Court, and a motion was there made to remand the cause. A motion was also entered that the court take jurisdiction. The latter motion was sustained. Afterwards a final decree was entered directing the sale of certain property, which sale occurred in due time. A final order confirming the sale was entered. Turner and the railway company appealed from the order confirming the sale. Numerous errors were assigned, but the court held that the question of jurisdiction in the Circuit Court could not be determined upon an appeal merely from the order confirming the report of sale. The court said:

"The Act of 1875, for the first time in the legislation of Congress, declares that an order of the Circuit Court remanding a cause may, in advance of the final judgment or decree therein, be reviewed by this court on writ of error or appeal, as the case may require the one or the other mode to be pursued. Prior to that Act the remedy, in that class of cases was by *mandamus*

to compel the Circuit Court to hear and determine the cause. Babbitt vs. Clark, 103 U. S. 606 (XXVI, 507); Railroad Co. vs. Wiswall, 23 Wall. 507 (90 U. S. XXIII, 103); Ins. Co. vs. Comstock, 16 Wall. 258 (83 U. S. XXI, 498). When the Circuit Court assumes jurisdiction of the cause, the party denying its authority to do so, may, after final decree and by a direct appeal therefrom, bring the case here for review upon the question of jurisdiction, the amount in dispute being sufficient for that purpose. Railroad Co. vs. Koontz, 104 U. S. 15 (XXVI, 646). In the present case we have seen that the appeal is only from the order confirming the sale. * * * In such cases, upon an appeal, not from the final decree, but only from an order in execution thereof, the court will not examine the record, prior to such decree, to see whether the petition for removal was filed in due time, or whether it makes a case of Federal jurisdiction, by reason of the presence in the suit of a controversy between citizens of different States, but will assume that the final decree, being passed by a court of general jurisdiction, and not showing upon its face a want of jurisdiction as to the subject-matter or parties, was within the power of the court to render."

In Crawford and others, Plaintiffs in Error, vs. Waller, 111 U. S. 796 (28 L. Ed. 602), a motion to dismiss was entered in the Supreme Court; united with it was a motion to affirm. Disposing of the former motion, Mr. Chief Justice Waite said:

"This motion is granted on the authority of Ins. Co. vs. Comstock, 16 Wall. 258 (83 U. S. XXI, 493), and Railroad Co. vs. Wiswall, 23 Wall. 507 (90 U. S.

XXIII, 103). An order of the Supreme Court of Washington Territory dismissing a writ of error to a District Court, because of the failure of the plaintiff in error to file the transcript and have the cause docketed within the time required by law, is not a final judgment or a final decision, within the meaning of those terms as used in Sections 702 and 1911 of the Revised Statutes, regulating writs of error and appeals to this court from the Supreme Court of the Territory. Section 702 provides for the review of final judgments and decrees by writ of error or appeal, and Section 1911 regulates the mode and manner of taking the writ or procuring the allowance of the appeal. The use of the term 'final decisions' in Section 1911 does not enlarge the scope of the jurisdiction of this court; it is only a substitute for the words 'final judgments and decrees,' in Section 702, and means the same thing. The dismissal of the writ was a refusal to hear and decide the cause. The remedy in such a case, if any, is by *mandamus* to compel the court to entertain the case and proceed to its determination, not by a writ of error to review what has been done. *Ex parte* Bradstreet, 7 Pet. 647; *Ex parte* Newman, 14 Wall. 165 (81 U. S. XX, 879)."

So much of the statute of March 3, 1875, as allowed a writ of error or an appeal based on an order remanding a case, remained in force until the Act of March 3, 1887; Stats. at Large, Vol. 24, Chapter 373, page 552 (re-enacted to correct enrollment, August 13, 1888, 25 Stats., Chapter 866, page 433). The latter part of Section 2 of said last-named act provides:

> "Whenever any case shall be removed from any State court into any Circuit Court of the United States,

and the Circuit Court shall decide that the case was improperly removed, and order the same to be remanded to the State court from whence it came, such remand shall be immediately carried into execution, and no appeal or writ of error from the decision of the Circuit Court so remanding such cause shall be allowed."

As all of the cases hereinbefore referred to construe so much of the Act of March 3, 1875, as allows the prosecution of an appeal or writ of error, the only portions of said decisions, except the first, that are applicable to Section 641, are those portions which discuss and illustrate the practice prior to the Act of March 3, 1875. Since the repeal of the said clause of the Act of March 3, 1875, the Supreme Court has filed an opinion in the case of German National Bank vs. Speckert, 181 U. S. 405, in which the court says:

"It has been constantly held that this court has no power to review by appeal or writ of error an order of a Circuit Court of the United States remanding a case to a State court."

The opinion refers to Morey vs. Lockhart, 123 U. S. 56 (31 L. Ed. 68).

In re Pa. Co., 137 U. S. 451 (34 L. Ed. 738), it was held that said Acts of 1887 and 1888—

"Took away the remedy by mandamus as well as that by writ of error or appeal in the case of an order of remand, the court holding that it was the intention of Congress to make the judgment of the Circuit Court remanding a case to the State court final and conclusive, because of the use of the words in the Act, 'such remand shall be immediately carried into execution.'"

But by reference to the said Acts of 1875, 1887, and 1888 it will be noticed that none of them can have any bearing upon the acts composing Section 641. That part of the Act of 1875 allowing an appeal or writ of error never did apply to Section 641, or to any of the acts composing that section. There never was any act allowing an appeal or writ of error from any order remanding a case removed under Section 641, or refusing to remand. Therefore, Section 641 is to be governed by the case first above cited and the subsequent cases sustaining said case. The case of *Ex parte* Virginia, or Virginia vs. Rives, 100 U. S., 10 Otto, 313 (25 L. Ed. 667), was based on an indictment in 1878—a date subsequent to the Act of 1875—in a State court of Virginia. The case was removed, under Section 641, to the United States Circuit Court, and that court took jurisdiction of same; but the Supreme Court maintained a proceeding for mandamus, and actually issued a mandamus to Judge Rives, directing him to return the prisoners to the State court and to refuse jurisdiction of the proceeding. If the Act of 1875 had applied to Section 641, the proceeding by mandamus would have been unnecessary, as a writ of error could have been allowed the State instead of an application for a writ of mandamus. The court, in an opinion by Justice Strong, said:

> "Upon the question whether a writ of *mandamus* is a proper proceeding to enforce the return of the men indicted to the custody of the State authorities, little need be said, in view of former decisions of this court. Section 688 of the Revised Statutes enacts that the Supreme Court shall have power to issue * * * writs of *mandamus* in cases warranted by the principles and usages of law, to any courts appointed under the

authority of the United States, or to persons holding office under the authority of the United States, where a State or an ambassador, or other public minister, or a consul or vice-consul, is a party. In what cases such a writ is warranted by the principles and usages of law it is not always easy to determine. Its use has been very much extended in modern times, and now it may be said to be an established remedy to oblige inferior courts and magistrates to do that justice which they are in duty and by virtue of their office bound to do. It does not lie to control judicial discretion, except when that discretion has been abused; but it is a remedy when the case is outside of the exercise of this discretion, and outside the jurisdiction of the court or officer to which or to whom the writ is addressed. One of its peculiar and more common uses is to restrain inferior courts and to keep them within their lawful bounds. Bacon, Abr., *Mand.*, Letter D; Tapping, *Mand.*, 105; 5 Bl. Com., 110. This subject was discussed at length in *Ex parte* Bradley, 7 Wall. 364 (74 U. S. XIX, 214), and what was there said renders unnecessary any discussion of it now. To that discussion we refer. In our judgment, it indicates the use of a writ of *mandamus* in such a case as the present.

"The writ will, therefore, be awarded."

Therefore, so much of the Act of 1875 as allowed a writ of error from an order remanding a case does not apply to Section 641. Neither does so much of the Acts of 1887 and 1888 as repealed so much of the Act of 1875 as allowed a writ of error, affect the acts composing Section 641, for Section 5 of the Acts of 1887 and 1888 specifically excludes the acts composing Section 641 from all of its provisions.

Section 5 of the Act of March 3, 1891, 26 Stats., page 826, creating Circuit Courts of Appeals, allows writs of error from District Courts and Circuit Courts direct to the Supreme Court, "in any case in which the jurisdistion of the court is in issue." It was held in Morey vs. Lockhart, 123 U. S. 56 (31 L. Ed. 68), and in Richmond & D. R. Co. vs. Thouron, 134 U. S. 45 (33 L. Ed. 871), and in Chicago, St. P., M. & O. R. R. Co. vs. Roberts, 141 U. S. 690 (35 L. Ed. 905), that—

> "Section 5 of the Judiciary Act of March 3rd, 1891, * * * does not authorize a writ of error to review an order of the Circuit Court remanding a case for want of jurisdiction, because such an order is not a final judgment."

This opinion is last referred to and approved in German National Bank vs. Speckert, *supra*. In Mo. P. R. R. Co. vs. Fitzgerald, 160 U. S. 556 (40 L. Ed. 536), it was again held that an order of court remanding a suit was not a final judgment or decree, and that such an order could not be reviewed by the Supreme Court for that reason. In this case it is also held:

> "As under the statute a remanding order of the Circuit Court is not reviewable by this court by appeal or writ of error from or to that court, so it would seem to follow that it cannot be reviewed on writ of error to a State court, the prohibition being that no appeal or writ of error from the decision of the Circuit Court remanding such a case shall be allowed."

See also, McLish vs. Roff, 141 U. S. 661 (35 L. Ed. 893), in which it is held, in the language of the syllabus, that:

"Under the Act of March 3, 1891, an appeal or writ of error cannot be taken to this court for review of a question involving the jurisdiction of the court below, except after final judgment in the case."

In the case of Burlington, etc., Ry. Co. vs. Dunn, 121 U. S. 182 (30 L. Ed. 885) it is held that if the Circuit Court remands the case, since the Acts of 1887 and 1888, the order remanding establishes the jurisdiction of the State court in a proper way; that under the Act of March 3, 1875, such an order could have been brought to the Supreme Court for review by appeal or by writ of error, and to expedite such hearing Rule No. 32 was adopted.

See also, Jurisdiction and Procedure, U. S. Supreme Court, by Taylor, pages 116, etc.

The result of all the foregoing acts and decisions is that Section 641 is unaffected by any of them, save the decision in Chicago & Alton R. R. Co. vs. Wiswall, and other like cases, in which it is held that the remedy against an order of the Circuit Court remanding a case to the State court for want of jurisdiction, or an order refusing to remand it, is by mandamus to compel action and not by appeal or writ of error to review what has been done, and that the Supreme Court of the United States has jurisdiction of a proceeding for such a mandamus.

The order appealed from herein, therefore, not being a *final* order or judgment in the cause, cannot be reviewed by this Honorable Court, either on appeal or by writ of error; and in no case is an *appeal* the proper method by which such review can be had.

Respectfully submitted,

CALEB POWERS.

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Babbitt vs. Clark, 13 Otto, 606.
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Hoard, *ex parte*, 15 Otto, 105.
Turner, *et al.*, vs. Railway & Trust Co., 16 Otto, 552
Crawford, *et al.*, vs. Waller, 111 U. S. 796.
Act March 3, 1887, 24 Stats. 552.
Act August 13, 1888, 25 Stats. 433.
German National Bank vs. Speckert, 181 U. S. 405.
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McLish vs. Roff, 141 U. S. 661.
Burlington, etc., Ry. Co. vs. Dunn, 121 U. S. 182.
Taylor's Jurisdiction and Procedure, U. S. Sup. Court, pp. 116, *et seq.*

Citations of Authorities

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SECTION 641, REV. STAT., IS CONSTITUTIONAL.

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WHEN REMOVAL PETITION TO BE FILED.

Home L. Ins. Co. vs. Dunn, 86 U. S., 214;
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Gray Tie and Lumber Co., vs. Farmers Bk., Id., 2319;
Wilson's Assignees vs. Lou. Nat. Bk. Co., 25 Id. 1065;
Booth & Co. vs. Bethel, Id. 747;
Brown vs. Crow, Hardin, 451;
Bryan vs. Bekley, Litt. Sel. Cas., 91;
Lewis vs. Lewis, 11 Ky. Law Rep., 413.

COMMON LAW DECIDES VALIDITY OF PARDON.

10 Peters, 200; 7 Peters, 150;
18 Howard, 310; 7 Wall., 582;
1 Abb., U. S., 114; 2 Abb. U. S., 395;
3 Ben., 316; 8 Blatchf., 96;
People vs. Bowen, 13 Am. Rpts., 148;
13 Am. Rep., 148; Church Habeas Corpus, sec. 458;
Ex parte Garland, 4 Wall., U. S., 333;
Cathcart vs. Robinson, 5 Peters, 264.

FEDERAL COURTS ENFORCE STATE PARDONS.

Ex parte Slauson, 73 Fed. Rep., 666;
13 Am. Rep., 148; Church *Habeas Corpus*, sec. 458;
Whitten vs. Tomlinson, 160 U. S., 231;
Iasigi vs. Van de Carr, 166 U. S., 391;
U. S. vs. Fowkes, 53 Fed. Rep., 13;
Ornelas vs. Ruiz, 161 U. S., 502;
Re Dana, 68 Fed. Rep., 886;
Re Ludwig, 32 Fed. Rep., 774;
Cook vs. Hart, 146 U. S., 183.

DE FACTO OFFICER.

Braidy vs. Teritt, 17 Kans., 471;
State Kansas vs. Durkee, 12 Kans., 308;
Ex. p. Powers, 129 Fed. Rep., 985;
Opinion Justice Harlan in Taylor vs. Beckham, 178 U. S. 548;
61 Am. St. Repts., 893; 20 Am. St. Rep., 337;
3 Am. St. Repts., 181; 19 Ind., 358;
23 Am. St. Repts., 51; 23 Ind., 449;
9 Am. St. Repts. 412; 17 Kans., 471;
37 Am. St. Repts., 829; 12 Kans., 314;
32 Am. St. Repts., 239; 1 Cranch, U. S., 454;
U. S. vs. Mitchell, 136 F. R., 896.

TITLE TO OFFICE DETERMINED BY QUO WARRANTO.

People vs. Olds, 58 Am. Dec., 398;
Mark vs. Wright, 13 Ind., 548;
Cochran vs. McCleary, 22 Iowa, 75;
Updegraff vs. Craus. 47 Penna. St., 103, et al.

LEGISLATIVE JOURNAL, WHAT CONSTITUTES?

85 Am. St. Repts., 42; 126 Ala., 425;
28 South, 497; Cooley's Const. Lim., 135;

Cushing's Law and Proceed. of Legis. Assem., sec., 415.

STATE DECISIONS INVOLVING GENERAL PRINCIPLE NOT FOLLOWED.

Town of Venice vs. Murdock, 92 U. S., 494;
Mohr vs. Manierre, 7 Biss., 419;
Olcott vs. Supervisors, etc., 83 U. S., 678.

SAME NOT FOLLOWED WHERE CIVIL RIGHTS VIOLATED THOUGH UPON LOCAL QUESTION.

Rowan vs. Runnels, 46 U. S., 134;
Bank of Ohio vs. Knoop, 57 U. S., 369;
Jefferson Branch Bank, vs. Skelly, 66 U. S., 436.

FEDERAL RECOGNITION CONCLUSIVE.

Jones vs. U. S., 137 U. S., 202;
Woolsey vs. Chapman. 101 U. S., 755;
Runkle vs. U .S., 122 U. S., 557;
Wilcox vs. Jackson, 38 U. S., 498;
U. S. vs. Eliason, 41 U. S., 291;
Confiscation Cases, 87 U. S., 92;
U. S. vs. Tarden, 99 U. S., 10;
Marberry vs. Madison, 5 U. S., 1 Cranch, 137;
Opinions Atty. Genl., Vol. 11, page 397;
Luther vs. Borden, 48 U. S., 7 Howard, 1, et al.

Supreme Court of the United States

OCTOBER TERM, 1905.

Nos. 15 and 393.

ORIGINAL.

THE COMMONWEALTH OF KENTUCKY, - *Petitioner,*

Vs.

ANDREW M. J. COCHRAN, - - - - *Defendant.*

THE COMMONWEALTH OF KENTUCKY, - *Appellant,*

Vs.

CALEB POWERS, - - - - - *Appellee.*

BRIEF FOR APPELLEE.

The uncontroverted allegations of the first paragraph of the petition for removal are that an absolute, unconditional, valid pardon was issued, delivered to, and accepted by, appellee for the identical offense herein charged; that said pardon has been thrice denied by the highest court in Kentucky; that, therefore, he is denied or can not enforce, in the judicial tribunals of said State, the equal civil rights secured to him, as a citizen of the United States, by the laws thereof. (Record, p. 10).

Petitioner, (appellant), contends that, admitting said allegations to be true, no ground for removal exists.

UNCONTROVERTED ALLEGATIONS ADMITTED.

Unless there is a record contradiction, the sworn allegations of a petition for removal, which are not traversed, must be taken as true.

> "If these averments were not true, the plaintiff should have denied them, and an issue would then have been made for the court below to try and determine. No answer was filed, no issue in any other way was taken. The plaintiff contented himself with making a motion to remand, which only raised a legal question, namely, whether, upon the facts stated in the petition for removal, taken in connection with the record, a case for removal was made out."

Dishon vs. C., N. O. & T. P. R'y. Co., 133 Fed. Rep., 471; Toledo Traction Co., vs. Cameron, 137 Fed.. Rep., 48; See also cases cited in vol. 18, Enc. Pl. and Pr., p. 372.

SECTION 641 IS CONSTITUTIONAL.

In *Ex parte* Virginia, 100 U. S., 339, the courts said:

> "Congress, by virtue of the fifth section of the Fourteenth Amendment, may enforce the prohibitions whenever they are disregarded by either the legislative, the executive, or the judicial department of the State. The mode of its enforcement is left to its discretion. It may secure the right, that is, enforce its recognition, by removing the case from a State court, in which it is denied, into a Federal court, where it will be acknowledged. Of this, there can be no reasonable doubt. Removal of cases from State courts into courts of the United States has been an acknowledged mode of protecting rights ever since the foundation of the Government. Its constitutionality has never been seriously doubted."

See also, Strauder vs. West Virginia, 100 U. S., 303;
Neal vs. Delaware, 103 U. S., 370;
Bush vs. Kentucky, 107 U. S., 110;
Gibson vs. Mississippi, 162 U. S,. 565;

Smith vs. Mississippi, 162 U. S., 592;
Murray vs. Louisiana, 163 U. S., 101;
Williams vs. Mississippi, 170 U. S., 213;
Virginia vs. Rives, 100 U. S., 313;
Ex. p. Virginia, 100 U. S., 339.
Tennessee vs. Davis, 100 U. S., 257.

ARE CIVIL RIGHTS LIMITED TO ANY CLASS OF CITIZENS?

For some years after the Fourteenth Amendment was promulgated, the courts were inclined to believe that its restrictions, guaranteeing equal protection, would never be applied, except to prevent discrimination, by the States, against the negro, on account of his race or color. In 1872, when this question was first before the court in the Slaughter House cases, 83 U. S., 36, the court, by Mr. Justice Miller, said:

> "We doubt very much whether any action of a State not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision. It is so clearly a provision for that race and that emergency, that a strong case would be necessary for its application to any other."

Similar language was also used in Strauder vs. West Virginia, 100 U. S., 303, and *Ex parte* Virginia, 100 U. S., 339, decided at the October term, 1879. These cases were erroneously construed by many of the State Courts, as actually holding that the Amendment, in the respect named, would have to be restricted in its application to questions of discrimination on account of race or color. Prominent among the opinions giving that construction, are the cases referred to in 59 Am. Repts., 488.

And, indeed, when we examine all the Acts of Congress, passed by virtue of the fifth section of the Amendment, which provides:

> "Congress shall have power to enforce by appro- private legislation the provisions of this Article,"

we conclude that Congress, too, for many years, must have believed that the application of the Amendment would be limited as stated in that part of the opinion in the Slaughter House cases cited. See Sec. 16, Act of May 31, 1870; 16 St., at L., p. 144, now Sec. 1977 *supra;* and the Act of March 1, 1875; 18 St. at L., 335; Comp. St., 1901, p. 1259, and last clause of Act of June, 1879, Sec. 2; 21 St. at L., 43; Comp. St., 1901, p. 624; and Sec. 17 of the Act of May 31, 1870, now Sec. 5510, Rev. St., U. S.

All of these statutes secure to persons the right not to be discriminated against on account of race or color; and, except the right secured to aliens by the last-cited section, no other rights are specifically secured by any of them. If it were not that the Amendment operates by its own force, many, in fact, a large majority, of the most important rights secured by the Amendment could not now be enforced in the courts. But, the preamble to the Act of Congress of March 1, 1875, to enforce the Amendment, shows that Congress never believed that the Amendment would necessarily have to be restricted to questions of race, etc. Said preamble is as follows:

> "Whereas, it is essential to just government we recognize the equality of all men before the law, and hold that it is the duty of the government in its dealings with the people to mete out equal and exact jus-

tice to all, of whatever nativity, race, color or persuasion, religious or political, and it being the appropriate object of legislation to enact great fundamental principles into law, therefore," etc.

This court has long since discarded the view, limiting the operation of the Amendment to questions of race and color. By later descisions, it has held, without qualification, that its provisions apply to every form of State action, legislative, political or judicial, regardless of race or color, and to the official acts of every State officer, as well, and to the benefit of all persons within the jurisdiction of any State.

In the case of Holden vs. Hardy, 169 U. S., 366, decided February 28, 1898, the court, by Mr. Justice Brown, said:

"This Amendment was first called to the attention of this court in 1872, in an attack upon the constitutionality of the law of the State of Louisiana, passed in 1869, vesting in a slaughter house, company therein named the sole and exclusive privilege of conducting and carrying on a live stock landing and slaughter house business, within certain limits, specified in the Act, and requiring all animals intended for sale and slaughter to be landed at their wharves, or landing places. (Slaughter House Cases, 83 U. S., 16 Wall., 36). While the court in that case recognized the fact that the primary object of this Amendment was to secure to the colored race, then recently emancipated, the full enjoyment of their freedom, the further fact that it was not restricted to that purpose, was admitted both in the prevailing and dissenting opinions, and the validity of the Act was sustained as a proper police regulation for the health and comfort of the people. A majority of the cases which have since arisen have turned, not upon a denial to the colored race of rights therein secured to them, but upon alleged discrimination in matters entirely out-

side of the political relations of the parties aggrieved."

All of the courts now hold that the Amendment confers upon artificial persons the same protection of equal rights that it confers upon natural persons, although it was eighteen years after its adoption before it was held to apply to corporations.

Mo. Pac. R. R. Co. vs. Mackey, 127 U. S., 205;

Santa Clara County vs. Sou. Pac. R. R. Co., 116 U. S., 394;

Pembina Con. Silver Min. etc. Co., vs. Penna., 125 U. S., 181.

And its application has become so general that no case now attempts to specify or define the rights that can be asserted under it. This honorable court has thought it wise to leave these rights to be determined "in each case, as presented for adjudication."

WHAT IS MEANT BY EQUAL CIVIL RIGHTS?

Equal civil rights, or the equal protection of the laws guaranteed by the Amendment, have been defined in the Kentucky Railroad Tax Cases, 155 U. S., 321, as requiring "the same means and methods to be applied impartially to all constituents of each class, so that the law shall operate equally and uniformly upon all persons in similar circumstances."

In the case of Holden vs. Hardy, 169 U. S., 366, the court declares the Amendment to mean that all persons "shall be treated alike under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed."

"The equal protection of the laws is a pledge of the protection of equal laws." Yick Wɔ vs. Hopkins, 118 U. S., 356.

In Ho Ah Kow vs. Nunan, a Chinaman was imprisoned for violating a law of California. The sheriff cut off his queue. He sued the sheriff in the United States Circuit Court for the District of California, alleging that it is the custom of Chinamen to shave the hair from the front of the head, and wear the remainder braided into a queue; that to deprive him of his queue is regarded by his countrymen as a disgrace and, according to their religious faith, is attended with misfortune, and suffering after death. The sheriff set up, in defense, an ordinance requiring that the hair of all prisoners should be "cut or clipped to a uniform length of one inch from the scalp." Circuit Justice Fields, sustaining a demurrer thereto, held that the ordinance imposed an unequal punishment upon the Chinaman, because of the great value he placed upon his queue; that it was a discrimination in violation of the equal protection clause of the Amendment, and the ordinance therefore void.

Ho Ah Kow vs. Nunan, 6546 Fed. Cases.

In Gandolfo vs. Hartman, et al., U. S. Circuit Court, Souther District of California, it was held that a covenant in a deed not to convey to a Chinaman is void, as a discrimination against the Chinaman, in violation of the Amendment.

A STATE, BY ITS JUDICIAL TRIBUNALS, CAN NOT DENY TO A CITIZEN OF THE UNITED STATES "A RIGHT SECURED TO HIM BY ANY LAW PROVIDING FOR THE EQUAL CIVIL RIGHTS OF CITIZENS OF THE UNITED STATES."

A discussion of this question necessarily brings to the front the further question: What rights do the constitution and laws of the United States secure to persons charged in a State court with a violation of a State law?

For answer, resort must be had to the constitution itself, to discover its provisions creating or securing such rights.

Going to the constitution, we find nothing directly applicable, in either the original draft, or the first twelve Articles of Amendment. The Thirteenth Article relates solely to the subject of slavery, and has no application. The first section of the Fourteenth Article of Amendment is as follows:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

The fifth section provides:

> "The Congress shall have power to enforce, by appropriate legislation, the provisions of this Article."

It will be noticed that the prohibitions of this Amendment refer to State action, exclusively, and not to the action of individuals. The State is prohibited from

denying to any person within its jurisdiction, the equal protection of the laws; therefore, all legislation to enforce this Amendment is intended for protection against State infringement.

In Bowman vs. Lewis, 101 U. S., 22 ,the court said:

> "It is the right of every State to establish such courts as it sees fit, and to prescribe their several jurisdictions as to territorial extent, subject-matter and amount, and the finality and effect of their decisions; provided it does not encroach upon the proper jurisdiction of the United States, and does not abridge the privileges and immunities of citizens of the United States, and does not deprive any person of his rights, without due process of law, nor deny to any person the equal protection of the laws."

In Pace vs. Alabama, 106 U. S., 583;

> "That it, (the Fourteenth Amendment), was to prevent hostile and discriminating State legislation against any person or class of persons. Equality and protection, under the laws, applies not only to accessibility by each one, whatever his race, on the same terms with others, to the courts of the country for the security of his person and property, but that, in the administration of criminal justice, he shall not be subjected for the same offense to any greater punishment."

And in Moore vs. Missouri, 159 U. S., 673;

> "The Fourteenth Amendment means, that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons, or other classes, in the same place and under like circumstances."

As pertinently stated by Mr. Guthrie, in his work on the Fourteenth Amendment, pages 107-8:

"In proposing the Fourteenth Amendment, its framers pointed out that equality, although the 'very spirit and inspiration of our system of government, the absolute foundation upon which it was established,' was no where adequately secured, and that it had, in many instances, been denied by the States; and they urged the adoption of a measure which would guarantee equality in the future. In order, therefore, to secure this equality before the law, the Reconstruction Committee placed at the end of Section 1, a clause providing that no State should 'deny to any person within its jurisdiction the equal protection of the laws,' and this has been interpreted to be 'a pledge of the protection of equal laws.' The provision supplemented and completed the guaranties embodied in the requirement of due process of law; and the framers of the Fourteenth Amendment contemplated that this guaranty of the equal protection of the laws would have the broadest scope. It will probably be found in the future to be the most important and far-reaching of the provisions of this Amendment, and to protect where due process of law would be found inadequate fully to conserve our civil and political ~~liability~~ liberty."

WHAT INTERPRETATION IS PLACED UPON THE WORDS, "AT ANY TIME BEFORE THE TRIAL OR FINAL HEARING OF THE CAUSE," AS FOUND IN SECTION 641?

On this point, counsel for the State appear to make no further question.

In the case of Fisk vs. Henarie, et al., 142 U. S., 459, it is held that, after a cause has been tried three times in the State court, an application for removal is too late, under the Acts of Congress, by virtue of which the removal was had in that case. This makes it necessary to examine the statute on which the removal was based, compare that statute with Section 641, and discover the difference.

The Fisk case involved a construction of the Act of March 3, 1887, 24 Stat. at L., 552, as corrected by the Act of August 13, 1888, 25 Stat. at L., 435. That Act provided that the petition should be filed "at any time before the trial" of the case.

In commenting upon the Act, and its bearing upon previous statutes, the court referred to the following:

1. The Judiciary Act of 1789, which provided that the petition for removal should be filed "at the time of entering his appearance in such State court." (1 Stat. at L., 79).

2. The Act of July 27, 1866, relating to separable controversies which fixed the time for filing the petition for removal "at any time before the trial or final hearing of the cause." (14 Stat. at L., 306).

3. The Act of March 2, 1867, relating to prejudice or local influence, which provided that the petition for removal should be filed "at any time before the final hearing or trial of the suit." (14 Stat. at L., 558).

4. Section 639, Revised Statutes of the United States, the first sub-division of which is a re-enactment of the twelfth section of the Judiciary Act, the second, of the Act of July 27, 1866, and the third of the Act of March 2, 1867. This section fixes the time for filing the petition for removal "at any time before the trial or final hearing of the suit."

5. The Act of March 3, 1875, which provided that the petition should be filed "before or at the term at which said cause could be first tried, and before the trial therof." (18 Stat. at L., 470).

It will be noticed that Congress dropped the word "final" in the last Act. The effect of dropping it was determined in the following cases:

Gregory vs. Hartley, 113 U. S., 742;

Alley vs. Nott, 111 U. S., 742;

Laidley vs. Huntington, 121 U. S., 179.

All of them hold that, if the trial court had set aside a verdict and granted a new trial, or if the Appellate Court had reversed the judgment and remanded the case for trial *de novo,* it was too late to apply to remove the cause.

But the opinion in the Fisk case, *supra,* can now have no effect upon the question of removal. The case at bar must be dicided by the language in Section 641, which was brought into the Revised Statutes from the Acts of May 31, 1870, 16 Stat, at L., 144; April 9, 1866, 14 Stat. at L., 27; March 3, 1863, 12 Stat. at L., 756, and May 11, 1866, 14 Stat. at L., 46. This Section provides that the petition for removal may be filed "at any time before the trial or final hearing of the cause," and must, therefore, be controlled by the following cases:

Home L. Ins. Co. vs. Dunn, 86 U. S., 19 Wall., 214;

Vannevar vs. Bryant, 88 U. S., 21 Wall., 41;

Jifkins vs. Sweetzer, 102 U. S., 177;

B. & O. R. R. Co., vs. Bates, 119 U. S., 464;

City of Detroit vs. Detroit City Ry. Co., 54 F. R., 10, opinion by Judge Taft.

Parker vs. Vanderbilt, et al., 136 F. R., 246.

These last cases hold that it is not too late to apply for removal, even though there have been former judgments and reversals, when the statute reads as does Section 641.

The case of Bush vs. Kentucky, 107 U. S., 110, was removed from the State court, under Section 641, after

a reversal by the Court of Appeals of a judgment in the trial court.

No jurisdiction or right covered by Section 641 is repealed or affected by the Act of March 3, 1887, as amended by Act of August 13, 1888, by provision of section 6 of that Act.

WAS THE CASE AGAINST APPELLEE PROPERLY REMOVED TO THE FEDERAL COURT FOR TRIAL?

We will limit a discussion of this question to the first paragraph of the petition for removal. (Record p. 10.)

The cases of Strauder vs. West Virginia, 100 U. S., 303; Virginia vs. Rives, 100 U. S., 313; *Ex parte* Virginia, 100 U. S., 339; Neal vs. Delaware, 103 U. S., 370; Gibson vs. Miss., 162 U. S. 579, hold that the Amendment is much broader than Section 641; that many rights are protected by the Amendment, a denial of which by the State, *during the trial,* can not constitute grounds for removal. These cases seem to hold that, as the cause for removal must, under the Act, exist *before the trial or final hearing* of the cause, that *that* cause must necessarily be a denial of equal civil rights by either a law or a constitutional provision of the State. The first paragraph of the petition for removal, herein, fully meets, as we believe, all the requirements of these decisions, even though they do require a *law* or constitutional amendment to justify the removal. It alleges that certain *laws of Kentucky* stand between appellee and the courts of the State, and force the latter to deny the former the equal protection of the laws secured by this Amendment.

Said paragraph states that, on March 10, 1900, and before appellee was indicted, a warrant for his arrest, having been issued on the 9th day of that month, he was granted by Wm. S. Taylor, the duly elected, and, by the Executive officials of the United States, the duly recognized Governor of Kentucky, and had duly accepted, a valid pardon for the identical offense covered by the indictment against him; that the failure of the said State courts to recognize and hold said pardon effective, denies to him the equal protection of the laws of Kentucky, for the reason that no other pardon, granted by any Governor of Kentucky, has ever been held by any Kentucky court to be non-effective; that, in each of the three trials, he presented and claimed the full benefit of said pardon; that each time the trial court refused to recognize same, or to allow him to introduce it, in any way, or for any reason; that the action of the trial court in each one of said trials has been approved by the Court of Appeals, the highest court of the State of Kentucky, by opinions which have been reported and are now a portion of the printed laws of the State; that these opinions are the law of his case, made so by the general laws of the State; that the State court in which the prosecution is pending, is, and in future trials will be, bound by these decisions; and that, in consequence thereof, he is denied equal civil rights by the laws of Kentucky.

The authority of the Governor of Kentucky to grant a pardon is created by section 77 of the constitution of said State, which provides that the Governor "shall have power to remit fines and forfeitures, ... grant reprieves and pardons, except in cases of impeachment." This

same provision existed in the constitutions of Kentucky, preceding the one now in force. See Art. 2, Sec. 10 of First, and Art. 3, Sec. 11 of the Second, Constitution of Kentucky.

Of such pardons, the Court of Appeals in case of Commonwealth vs. Bush, 2 Duvall, 265, said:

> "But, in all cases alike, the exercise of the Executive prerogative of remission or pardon, relieves from the *offense*, and discharges the accused from its legal penalties; and this may be done as well and effectually before as after formal conviction."

In the first opinion of the Kentucky Court of Appeals, in Powers vs. Commonwealth, that court, discussing the pardon to appellee, said:

> "On the trial, a pardon was produced, purporting to have been issued by W. S. Taylor, as Governor of Kentucky, dated March 10, 1900. The production of this paper was accompanied by what is termed in the record 'a plea of pardon.' As we understand the law, no plea was necessary. The simple production of a valid pardon of the offense whereof appellant was charged, would put an end to the proceedings, and render void any proceeding thereafter taken in the trial.
>
> "In order to decide the validity of the paper produced as a pardon, we must consider the situation at the time it was issued. This court takes judicial notice of the official signature of any officer of this State, (Ky. Stat. section 1625), and is presumed to know judicially who is the Executive of the State, at any time the fact is called in question. (Dewees vs. Colorado Co., 32 Tex. 570). See also 12 Am. & Eng. Enc. Law, p. 152, ad notes. It is conceded by counsel upon both sides that the court can take judicial cognizance of the facts necessary to the decision of this question." 110 Ky. Rep., pp. 399-400.

The court then proceeds to recite the contest be-

tween W. S. Taylor and Wm. Goebel for the office of Governor, and the alleged final decision of the Legislature in settlement of that contest, and concludes the subject by saying: "that decision,"---the decision of the Legislature, as claimed,---"settled the question finally, and the pardon must be adjudged invalid." Id. 403.

In the second opinion, the court said:

> "It is again argued that the pardon issued by Wm. S. Taylor, professing to be acting as Governor of the Commonwealth, on the 10th day of March, 1900, remitting the penalty, and pardoning appellant of this crime, is good, at least as the act of *a de facto* officer; that Taylor was actually then in possession of the office, and archives, and was exercising the prerogatives of the office of Governor, and as such *de facto* officer his acts, as between all others, are valid. This question was also fully and carefully considered by the court on the former appeal; and the ruling then, made, for the reasons then assigned, is adhered to." Ky. Repts. vol. 114, 273.

In the third opinion, the court said:

> "We find that now, as upon both of the former hearings, the validity of the pardon issued by W. S. Taylor to the accused, for the offense with which he stands charged, is urged in bar of the prosecution against him. * * * All of these questions were directly passed upon on the former appeals, as were most of the questions of the admission and rejection of testimony." * * * Pardon rejected. Ky. Law Rep'r, vol. 26, p. 1112.

That the foregoing decisions of the Kentucky Court of Appeals are binding upon all of the courts of Kentucky, and must, by those courts, be regarded as the inexorable law of this case, has been decided by the following, as well as many other cases:

Rowland vs. Craig, Sneed, 330;
Morgan vs. Dickerson, 1st T. B. Monroe, 20;
Legrand vs. Baker, 6th Id., 235;
Sims vs. Reed, 12 Ben. Mon., 51;
Gray vs. Dickinson, 11 Ky. Law Rep., 890;
L. & N. R. R. Co. vs. Survant, 19 Ky. Law Rep., 1576.
Schmetzer vs. L. & N. R. R. Co., Id., 1713;
Commonwealth vs. L. &. N. R. R. Co., 20 Id., 351;
L. & N. R. R. Co. vs. Ricketts, 21 Id., 662;
L. Ins. Co., vs. Monroe, Id., 782;
Breashears vs. Letcher County, Id., 1250;
Freeman vs. Mills, 22 Id., 859;
Butler vs. Prewitt, Id., 1911;
L. & N. R. R. Co. vs., Penrod, 24 Id. 50;
Gray Tie and Lumber Co., vs. Farmers Bk., Id., 2319;
Wilson's Assignees vs. Lou. Nat. Bk. Co., 25 Id. 1065;
Booth & Co. vs Bethel, Id., 747;
Brown vs. Crow, Hardin, 451;
Bryan vs. Bekley, Litt. Sel. Cas., 91;
Lewis vs. Lewis, 11 Ky. Law Rep., 413.

EQUAL CIVIL RIGHTS ARE DENIED BY STATE DECISIONS, NO LESS THAN BY STATE ENACTMENTS.

It was contended by counsel that the law of the State, denying Civil rights, must be a statute of the State. That position is not tenable. In Neal vs. Delaware, *supra*, the court said:

> "Had the State, since the adoption of the Fourteenth Amendment, passed any statute in conflict with its provisions, or with the laws enacted for their en-

forcement, or *had its judicial tribunals, by their decisions,* repudiated the Amendment as a part of the supreme law of the land, or declared the Acts passed to enforce its provisions to be inoperative and void, there would have been just ground to hold that there was a denial, upon its part, of equal civil rights, or such an inability to enforce them in the judicial tribunals of the State as, under the constitution, and within the meaning of section 641, would authorize a removal of the suit or prosecution to the Circuit Court of the United States."

In Bush vs. Kentucky, 107 U. S., 110, opinion by Justice Harlan, in determining what was the law of Kentucky within the meaning of Section 641, the court considered, among other things, the opinion of the Kentucky Court of Appeals in Commonwealth vs. Johnson, 78 Ky., 511, and held that, as said opinion had declared that the statutes of Kentucky, excluding negroes from grand and petit juries because of their race, was unconstitutional, said opinion, and not the statutes, was to be regarded as the law of the State.

FEDERAL COURTS MUST ENFORCE VALID STATE PARDON, WHEN DENIED BY HIGHEST STATE COURT.

When the common law of England was adopted as a part of our jurisprudence, the pardoning power, as exercised by the British Crown and Parliament, was as well understood, as established. Before the Revolution, it was exercised in those parts of this country which were British Colonies. The same power, in its essential elements, has been conferred upon the Executive of our States and Nation.

"It is the intention of the Constitution that each of

the great co-ordinate departments of the Government ----Legislative, Executive, and Judicial----shall be, in its sphere, independent of the others. To the Executive, alone, is entrusted the power to pardon, and it is granted without limit. Pardon includes amnesty. It blots out the offense pardoned, and removes all its penal consequences." From opinion of Chief Justice Chase in United States vs. Klein, 13 Wall., 128, (80 U. S.)

These words are as applicable to the Constitution of Kentucky.

When, therefore, the validity and effect of a pardon are to be determined, the established principles of the common law will control, in State and Federal courts, in the absence of enactment to the contrary. If not the first, in establishing these principles, certainly the leading case is that of the United States vs. Wilson, 7 Peters, 150, opinion by Chief Justice Marshall, accepted as conclusive. Cited at its conclusion are:

10 Peters, 200;
18 Howard, 310;
7 Wall., 582;
1 Abb., U. S., 114;
2 Abb., U. S., 395;
3 Ben., 316;
8 Blatchf., 96.

"The pardoning power, whether exercised under the Federal or State constitutions, is the same in nature and effect as that exercised by the representatives of the British Crown in colonial times in this country."

People vs. Bowen, 13 Am. Repts., 148;
Church on *Habeas Corpus*, section 458.

"When the pardon is full, it releases the punishment, and blots out of existence the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offense." *Ex parte* Garland, 4 Wall, U. S., 333.

A citizen of the United States is arrested, and tried for a State offense, notwithstanding he holds a valid pardon, which is denied recognition in the highest State court. In legal contemplation, an innocent man is thrown in prison. Can the Federal courts restore his liberty, either by (1) *habeas corpus*, or (2) removal proceedings? In the latter, a trial can be had upon the merits of the charge, and the pardon, heard upon its merits, can be offered in arrest of judgment, if need be, from any cause. As we conceive, either proceeding is available.

"The language used in the Constitution to grant reprieves and pardons must be construed with reference to its meaning at the time of its adoption. At the time of our separation from Great Britain, that power had been exercised by the King, as the Chief Executive. Prior to the Revolution, the Colonies, being in effect under the laws of England, were accustomed to its exercise in the various forms, as may be found in the English law-books. They were, of course, to be applied as occasions occurred, and they constituted a part of the jurisprudence of Anglo-America. At the time of the adoption of the Constitution, American statesmen were conversant with the laws of England, and familiar with the prerogatives exercised by the Crown. Hence, when the words, 'to grant pardons,' were used in the Constitution, they convey to the mind the authority as exercised by the British Crown, or by its representatives in the Colonies. At the time, both Englishmen and Americans attached the same meaning to the word 'pardon.' In the convention which framed the Constitution, no effort was made to change its meaning, although it was

limited in cases of impeachment. We must then give the word the same meaning as prevailed here, and in England, at the time it found a place in the Constitution. This is in conformity with the principles laid down by this court in Cathcart vs. Robinson, 5 Peters, 264; Flavell's Case, 8 Watts & Serg., 197, Att'y Gen. Brief."

Ex parte Wells, 18 Howard, 310.

Facts in last-cited case were that President Fillmore had commuted the death sentence of William Wells to imprisonment for life. He accepted the pardon, with that condition. Subsequently, his counsel applied for writ of *habeas corpus* upon the ground that the pardon was absolute, and the condition void, because the Executive could not impose a sentence of imprisonment, after the pardon had become effective. The writ was denied because it was held that the President could impose the condition, could grant conditional pardons, as a proper exercise of the pardoning power. But, the right to relief in the Federal court, if condition void, was no where questioned.

See also Greathouse Case, 2 Abb. U. S., 385.

In the case of Ex parte Slauson, a citizen of Virginia was arrested on inter-State extradition proceedings, as a fugitive from justice from the State of Tennessee, upon the charge of the "fraudulent appropriation of money." Slauson sued out a writ of *habaes corpus* before the Federal Judge for the Eastern District of Virginia. *Held*, that facts recited in affidavit upon which requisition issued did not constitute the crime charged, did not constitute any crime, and the prisoner was discharged.

Ex parte Slauson, 73 Fed. Rep., 666;

Recognizing the same doctrine see,

Whitten vs. Tomlinson, 160 U. S., 231;

Iasigi vs. Van de Carr, 166 U. S., 391.

A Federal court can inquire into the lawfulness of an arrest for an extraditable offense. Such an inquiry opens the broad field to all defences allowed the prisoner, including pardon. On right of Federal court to inquire into ground upon which conviction could be had, on requisition from another State, see

U. S. vs. Fowkes, 53 Fed. Rep., 13;

Ornelas vs. Ruiz, 161 U. S., 502;

Ex parte Slauson, 73 Fed. Rep., 666;

Re Dana, 68 Fed. Rep., 886;

Re Ludwig, 32 Fed. Rep., 774;

Cook vs. Hart, 146 U. S., 183;

Though extradition cases, the principle is here established.

In the case at bar, a removal is asked because there has been a final determination in the State court which denies equal civil rights, in the plain language of section 641, Revised Statutes. The issue, delivery and acceptance of a valid pardon being admitted, the refusal of the courts of Kentucky to recognize same is a discrimination against appellee, a denial of the equal protection of the laws secured by the Fourteenth Amendment, because a denial of the benefit of the pardoning power, which must operate upon all alike. This broad statement is made in the light of the fact that the allegations of the petition for removal must be taken as true.

PART II.

The record admissions of the allegations of the petition for removal limit the scope of the present inquiry, and the adjudication to be predicated upon their truth.

We believe, therefore, that the foregoing facts, and authorities in support, thereof, constitntute the whole field of judicial inquiry as to the first paragraph, thereof, and that this brief could well be closed here; but, the position of opposing counsel will now be considered.

With all deference, we respectfully submit that the consideration of the merits of the pardon, when the record admits its validity, is unjustifiable. As well argue questions admitted on demurrer. Counsel who have admitted, by failure to traverse, the validity of the pardon, now deny it. That issue should have been made, and the question tried out, in the court below. An issue on the merits of the pardon cannot, for the first time, be made here. The record is made up. And there has been no decision by the State as to who was Governor when same issued, in order for counsel to argue, as they do, that said decision is a local one, which this court should follow. If said State court, *with jurisdiction*, had decided who was then Governor, we concede that such decision would be a local question, but that court said that it had no such jurisdiction and did not undertake to decide the question. On the other hand, we do not understand that counsel take the position that a decision upon the validity of a pardon, decides a local question, which finding, this court will follow. They evade that position. Concede that a State court takes judicial cognizance of a State

officer whose *title* is not questioned; the failure to recognize a pardon does not determine the title to the Governorship, nor does it make a decision on the pardon a local one, peculiar to that State, as counsel intimate. We quote from their brief:

> Page 3. "On Powers' appeal from his first conviction the Court of Appeals of Kentucky held that Wm. S. Taylor was not Governor on March 10, 1900, when he assumed to grant a pardon to Powers, and that the pardon was therefore not valid."
>
> Page 4. "They, (the Appellate Court), referred to their former decision in Taylor vs. Beckham, 108 Ky., 278, in which they held that the judgment of the Legislature was final and conclusive, and not open to judicial review, and said: 'That decision settled the question finally and the pardon must be adjudged to be invalid.' "
>
> Page 4. The next sentence is: "The foregoing decision of the Court of Appeals of Kentucky, that Taylor was not Governor of the State on March 10, 1900, presents no Federal question, and, if erroneous, denies no right secured to him by the constitution and laws of the United States."
>
> Page 5. "It must be regarded as settled by the decision of the Court of Appeals of Kentucky in Powesr vs. Commonwealth, 110 Ky., 386, and by the judgment of this court in Taylor vs. Beckham, 178 U. S., 548, that the decision of the Legislature of Kentucky, in the proceeding between Beckham and Taylor to contest the election for Governor, was final, and not subject to review by any court, State or Federal."

Counsel here twice alternately assert:

1. That the court decided that Taylor was not Governor when pardon issued;
2. That the court decided that the action of the

Legislature, on the contest for Governor, was not subject to review.

The question on Powers' appeals was the validity of the pardon. Counsel deduce, by their inexorable logic, that, because the court held the pardon invalid, therefore Taylor was not Governor when he issued it, thereby ousting him collaterally, as though it could not have been held invalid for non-delivery, non-acceptance, etc., without involving, as it could not, the title of the incumbent, and his acts as to third parties, and for the State. Attention is called to these assertions of counsel in order to emphasize the fact that the Court of Appeals never decided, at any time, that Taylor was not, or that Beckham was, the Governor of Kentucky. The question of the title to that office was never before that court but in the single case of Taylor vs. Beckham, in which the court decided that it had no jurisdiction. What the court actually decided was condensed, in conclusion, the Chief Justice writing, as follows:

> "For these reasons, we are of the opinion that the courts of this State are without authority to enter into the inquiry sought in this case, and that the journals of the General Assembly are conclusive of the controversy. The judgment of the lower court, being in accordance with these views, is therefore affirmed." Taylor vs. Beckham, 108 Ky., 306.

That opinion was rendered on April 6, 1900, and Powers was pardoned twenty-seven (27) days before that date, on March 10, 1900.

The following section of the State statute, which provides for contests for Governor, has been quoted, as though conclusive:

"When a new election is ordered or the incumbent adjudged not to be entitled, his powers shall immediately cease, and if the office is *not* adjudged to another, it shall be deemed vacant."

Assuming that the Legislature did determine the contest, which we deny, the office *was* "adjudged to another," and, under the express words of the statute, it could *not* "be deemed to be vacant." The incumbent could rightfully retain possession, under the statute, as shown later.

The remainder of said section, "his powers shall immediately cease," must be construed to mean that his powers, as between himself and the successful contestant, should cease; and, that the incumbent could not thereafter be the beneficiary of his own acts, as to emoluments, or otherwise.

The principles of law determining the acts of a *de facto* officer, so far as they bind the State,and affect the life, liberty, or property of third parties, are too well established, both in reason and as a necessary part of government, to be repudiated by a State statute. If so, that part thereof, in conflict with such principles, is unconstitutional.

When an officer has been lawfully inducted into office, and holds actual possession, thereof, claiming title by virtue of a certificate of election, his authorized official acts, until legally and actually ousted, are binding upon the State and third persons, regardless of the alleged determination of a contest. His powers continue, as originally invested, pending any litigation that may properly ensue, and it is his duty to hold said office until title thereto is finally adjusted. Authorities on *de facto* of-

ficers are very numerous. Referring to list at beginning of this brief, we quote these as especially applicable:

In the circuit court case of United States vs. Mitchell, 136 F. R. 896, the court, discussing the eligibility of a district attorney, said:

"He is a *de facto* officer, and is entitled to continue in the office until it is judicially declared by a competent tribunal, in a proceeding for that purpose, that he has no right to it. 8 Ency. of Law, 788, citing a large number of cases. In the case of *In re* Manning, 139 U. S. 504, 11 Sup. Ct. 624, 35 L. Ed. 264, a conviction is uphled which was had in a trial before a *de facto* judge of a court *de jure*. The case was from Wisconsin, where the rule is recognized in a long series of decisions that 'if the office has been lawfully established and a person exercises the functions thereof by color of right, but whose election or appointment thereto is illegal, his official acts therein can not be successfully attacked in collateral proceedings, but in all such proceedings will be valid and binding until the officer is ousted by the judgment of a court in a direct proceeding to try his title to the office.' The rule is required by public policy. As stated by Justice Story in the Bank of United States vs. Danbridge, 12 Wheat. 64, 6 L. Ed. 552: For the purpose of 'upholding transactions intimately connected with the public peace and the security of private property,' the law indulges in its own presumptions; 'thus it will presume that a man acting in a public office has been rightfully appointed; that entries made in public books have been made by the proper officer,' etc."

"We have also held, (12 Kans., 308), that the officer *de facto* is the proper person to hold the office pending any contest therefor."

Braidy vs. Teritt, 17 Kans., 471, opinion by Justice Valentine, Justice Brewer concurring.

In the case of 12 Kans., 308, referred to, it was held:

"The interests of the public require that the duties

and functions of a public office should be performed by some one ,as well during the pendency of litigation concerning the right to such office, as at other times.

"In an action in the nature of *quo warranto*, against officers *de facto*, who claim to be officers *de jure*, it is not error for the judge of the court below to dissolve a temporary injunction granted to restrain said officers *de facto* from exercising the duties and functions of their respective offices, pending the litigation."

State of Kansas vs. Durkee, 12 Kans., 308.

This case illustrates the principle. One cannot enjoin public officers, and stop the wheels of government. "The king never dies."

In *Ex parte* Powers, 129 Fed. Rep., 985, United States District Judge Evans, holding said pardon valid, said:

"It goes without saying, in my judgment, that every citizen of Kentucky, equally with all of his fellows, is entitled to the benefits of a free and full pardon given by a Governor, either *de jure* or *de facto*. If he be the acting Governor, under color of law, his acts, upon every principle of law known to me, are effective, and particularly so until after his title to the office has been finally adjudged to be invalid. See *In re* Henry Ward, 173 U. S., 454, 19 Sup. Ct. 459, 43 L. Ed. 765. Can one citizen alone be denied the benefits of such a pardon, while all others have the rights to such bnefits, and still not be deprived of the equal protection of the laws? is a most important inquiry."

Justice Harlan, in Taylor vs. Beckham, 178 U. S., 548, said:

"It cannot be doubted that the certificate awarded to Taylor established at least his *prima facia* right to the Governorship.

Taylor, having received his certificate of election, based upon the returns of the Secretary of State, took

the oath of office as Governor, on December 12, 1899 ----the oath being administered by the Chief Justice of the Court of Appeals of Kentucky----and entered upon the discharge of his duties, taking possession of the public buildings, provided for the Governor, as well as of the books, archives and papers committed by law to the custody of that officer. After that, and until he was lawfully ousted, his acts as Governor, in conformity to law, were binding upon every branch of the State government, and upon the people."

A more firmly established governmental principle, in which the law of *de facto* officers as a necessary part of government, takes its root, is to be found in the nature of sovereignty itself, common to the governments of our States and Nation, and having its origin in the government of England. The law ascribes to British sovereignty an absolute immortality. The English government is a corporation sole, for purposes of perpetuity. In that respect, our States and Nation are molded in its exact likeness. When title to an office is contested, the incumbent remains clothed with its powers, as originally invested, pending litigation, and until final adjudication. The institution of a contest does not cause the office to shift to the contestant, who may be ultimately held not entitled. Public business must be transacted as well during such litigation as at other times. There can be no interregnum. Some one must ever represent the sovereign power. A contest merely determines the *right* to the office as between the claimants. The successful party cannot discharge the duties so long as the office remains in the adverse possession of his opponent, who has had, and retains, the legal *indicia* of title. A State statute can not over-ride these general principles, especially, if

rights of third parties have intervened, but must be subordinated to, and construed consistently with, them.

OPPORTUNITY TO PROVE PARDON VALID.

Aside from record admission of the fact of Federal recognition of the Taylor administration, and the general principles of law as to *de facto* officers, and the perpetuity of sovereignty, the validity of the pardon could have been tested upon its merits, had counsel traversed the allegations of the petition for removal. It has been, and can be, shown that the Kentucky Legislature never determined the contest for the Governorship; that no original Legislative journals can be produced to establish that fact, and that none were ever kept by either House thereof; that the State Librarian, the custodian of original journals if in existence, has never had any original journals of that session of the Kentucky Legislature, and can now produce only what purport to be printed copies of originals that do not exist, and were never kept. Said pretended "copies" were printed sixty days after the Legislature had adjourned, and were never approved by said body to give them the sanction of verity. A Legislative journal must be a bound volume, prepared by the clerks, that becomes a permanent record. Neither original bills and resolutions, as introduced, nor the original notes as taken down by the clerks, are competent to show Legislative action. (85 Am. St. Repts., 42, and others). But even these can not be produced as to that session of the Legislature.

Furthermore, it has been, and can be, proved, by those reported to have participated in said alleged determination of said contest, that it was never, in fact,

determined by either House of that body, in separate or joint session. It is competent for a third party, whose rights are involved, to prove that no such action was taken, and there are no Legislative journals to establish the fact. If the judicial tribunals of a State can not, upon a local question, deny guaranteed constitutional rights, assuredly Legislative action can not. Yet, it does, though said action was never taken. (See authorities, p. 38).

TITLE TO OFFICE NOT DETERMINED BY SUIT BETWEEN A AND B.

It is well settled that title to an office can not be determined in a suit between A and B. The judgment in such a suit binds the parties therto, but them only. To be conclusive upon all the world, it must be by *quo qarranto.*

In addition to authorities cited, see also:

People vs. Olds, 58 Am. Dec., 398;

Marke vs. Wright, 13 Ind., 548;

Cochran vs. McCleary, 22 Iowa, 75;

Updegraff vs. Crane, 47 Penna, St., 103, et al.

In the contest between Taylor and Beckham, each sued the other, and the suits were consolidated; the existence of and recitals in original Legislative journals were alleged, and admitted on demurrer; the prevailing opinion of this court was that office was not property, and there was no right of "life, liberty, or property" to give the court jurisdiction. The decisions, therefore, that the courts had no jurisdiction, left the contest where the Kentucky Legislature had left it. Conceding that the Legislature decided the contest, such action is not a judi-

cial determination, which this court regards as the action of a State court. The rule that decisions of State courts are followed on purely local questions does not include what a State Legislature may, or may not, do. Such action, if taken, is not a judicial determination.

Counsel contend that as the Court of Appeals decided that the pardon was invalid, they therefore decided that (1) Beckham was Governor, when it issued, and that (2) said decision is a local one, which this court will follow. We do not understand that counsel argue that the question of the validity of a pardon, in the abstract, is a local question. We will consider that subject, having shown that no court, State or Federal, ever decided between Taylor and Beckham, who was Governor of Kentucky, all holding that they had no jurisdiction.

STATE DECISIONS, INVOLVING GENERAL PRINCIPLES, NOT FOLLOWED IN FEDERAL COURTS.

If appellee was pardoned, no court had jurisdiction to arrest or try him. There are, perhaps, no questions that more involve general principles of law than those of pardon and jurisdiction, questions and principles common to all courts, local and peculiar to none. The opinion of Chief Justice Marshall in U. S. vs. Wilson, *supra*, is taken as conclusive of these questions. The opinions of this court thereon are all one way, in fact. It cannot then be successfully contended by appellant that because the highest State court has passed upon and denied a pardon, it is therefore a local question, peculiar to that State, and that the Supreme Court must follow that decision. The established principles of the common law control

in determining the validity of a pardon. Let us concede that, in questions that are local and peculiar to a State, the Supreme Court follows the decisions of that State. The question of pardon, however, is no more local than the obligation of contracts, which State legislation can not impair; than the nature of taxation, commercial law, jurisdiction, etc. In these and similar questions, involving general principles, the Supreme Court has universally held that no State decision was binding, or to be considered, in determining its action.

> "It is only decisions upon local questions, those which are peculiar to the several States, or adjudications upon the meaning of the constitution and statutes of a State, which the Federal courts adopt as rules for their own judgments."

Olcott vs. Supervisors, etc., 83 U. S. 678.

In last-cited case, referring to the construction of a railroad and the right of eminent domain, Justice Strong said:

> "Whether a use is public or private is not a question of constitutional construction. It is a question of general law. It has as much reference to the constitution of any other State, as it has to the State of Wisconsin. Its solution must be sought, not in the decisions of any single State tribunal, but in general principles, common to all courts. The nature of taxation, what uses are public and what are private, and the extent of unrestricted Legislative power, are matters, like questions of commercial law, no State court can conclusively determine for us."

Olcott vs. Supervisors, etc., *supra*.

That language can be applied, with equal force, to

the general principles that control in determining the validity of a pardon.

> "As to general principles, Federal courts follow their own views. *What shall constitute jurisdiction in a court is a general principle of law.*" Mohr vs. Manierre, 7 Bias. 419 (Italics ours).

The cases cited by counsel, (In re Converse, 137 U. S., 631, and Lambert vs. Barett, 157 U. S., 697), can have no bearing upon this case, because they relate purely to the construction by a State court of State laws. In the one case, the charge was embezzlement, under a State statute; in the other, the question was whether the Governor "could issue a warrant of execution of one convicted of murder after he had granted him a longer reprieve than authorized by the State constitution," the court holding that no Federal question was involved.

STATE DECISIONS NOT FOLLOWED, IF THEY DENY EQUAL CIVIL RIGHTS.

Federal courts do not follow State decisions upon the construction or enforcement of State laws, if they violate the Federal constitution, or the rights it guarantees.

Rowan vs. Runnels, 46 U. S., 134;

Bank of Ohio vs. Knoop, 57 U. S., 369;

Jefferson Branch Bank vs. Skelly, 66, U. S., 436.

The decisions rejecting Powers' pardon can not be here followed, not only because general principles of law, common to all courts, are involved, but because they deny to Powers the equal protection of the law in such a discrimination.

"Decisions of State courts, not resting upon construction of statutes of the State, but asserting general principles, independent of statute, are not obligatory upon United State courts in similar cases arising within the State." Town of Venice vs. Murdock, 92 U. S. 494.

Under this authority, based upon general principles heretofore mentioned, the decisions of the Kentucky court denying the pardon, and asserting, inferentially, who was Governor, are not to be considered in determining its validity.

It is only those decisions of a State court which settle some principle of local law that this court has ever felt bound to follow. If the constitution of Kentucky had granted Executive power to pardon a general class of offenses, and the State court had decided that the pardon to Powers was not embraced in said grant, or class, either, we conceive, would have been a local question—the construction of a State constitution. No such question is presented. The validity of the pardon must be determined by general principles of law as though issued by the President of the United States.

We have shown that the State court did not decide the title to the Governorship as between Taylor and Beckham; but, assuming that it did, we hold that the recognition of Taylor, as Governor, by the political department of the United States Government, is conclusive. The record admission is that said recognition continued until Governor Taylor's abdication of office, on May 21, 1900, when the majority opinion of this court was rendered.

FEDERAL RECOGNITION OF THE TAYLOR ADMINISTRATION AS THE STATE GOVERNMENT OF KENTUCKY, BINDS ALL COURTS.

In addition to said record admissions, it is shown by affidavits in the record that, on the 1st day of February, 1900, Governor Taylor applied to the President of the United Sattes for recognition as the proper and legal Governor of Kentucky, and for protection against domestic violence, and that he was so recognized as the Governor of Kentucky in a reply telegram addressed by President McKinley, in his own handwriting, to "Governor W. S. Taylor." (See affidavits of Chas. Emory Smith, John W. Griggs, George B. Cortelyou and Wm. S. Taylor, pp. 225, 230-3, 236-7, 241, record, and exhibits therewith filed).

After the alleged determination by the Legislature of the contest for the Governorship, and of the contests for the minor offices of said State, there was established in Frankfort dual State governments, each claiming to be the State government of Kentucky----the one, headed by Governor Taylor, occupying the Executive offices and public buildings of the State, and the other by J. C. W. Beckham, claiming to be Governor, in headquarters established at a hotel in said city. It again became necessary for the Executive department of the United States to decide which should be recognized as the State government of Kentucky. An immense amount of mail had accumulated in the postoffice at Frankfort, addressed to the "Governor of Kentucky" and to other State officers, as such, and the postmaster at Frankfort had requested the Postmaster General of the United States to instruct him

as to whom such mail should be delivered. Thereupon the Postmaster General, Chas. Emory Smith, sought the advice of Attorney General John W. Griggs, and the two took the matter to President McKinley; and, after due consideration by the three, it was determined by all of them that the United States would recognize the actual incumbents of said offices, the alleged determination of said contests notwithstanding, and that mail, addressed as aforesaid, should be delivered to said incumbents, and the Postmaster General was requested to, and did, so instruct the postmaster at Frankfort, and the mail was, by said postmaster, delivered accordingly. The delivery of all subsequent mail, so addressed, to Wm. S. Taylor, as the Governor, and to the other incumbents of said offices, was continued until the abdication of office by Taylor, when the case of Taylor vs. Beckham was decided by this court, on May 21, 1900. (178 U. S., 548). (See affidavit of Ass't. Postmaster J. W. Pruett, record, p. 235).

In other words, it is clearly shown that, at the date of the pardon, Wm. S. Taylor was, by the legally constituted authorities of the United States, duly recognized as the Governor of Kentucky.

Affidavits can be used on questions of fact raised on jurisdictional issues:

Jenkins vs. York Cliffs Imp. Co., 110 F. R. 807;

Wetmore vs. Rymer, 169 U. S. 115,.

The action of the Postmaster General, giving the aforesaid instruction to the postmaster at Frankfort, must be regarded as the act of the President himself.

Jones vs. United States, 137 U. S. 202;

Wolsey vs. Chapman, 101 U. S., 755;

Runkle vs. U. S., 122 U. S. 557;

Willcox vs. Jackson, 38 U. S., 498;

United States vs. Eliason, 41 U. S., 291;

Confiscation Cases, 87 U. S., 92;

U. S. vs. Tarden, 99 U. S., 10;

Marberry vs. Madison, 5 U. S., 1st Cranch, 137;

Opinions Attorney General, Vol. 11, page 397.

In Jones vs. United States, the Supreme Court, in discussing the manner in which the Executive power of the President may be made known, said:

"There can be no doubt that it may be declared through the Department of State, whose acts in this regard are, in legal contemplation, the acts of the President."

In Wolsey vs. Chapman:

"The acts of the heads of departments, within the scope of their powers, are, in law, the acts of the President."

In Runkle vs. United States:

"There can be no doubt that the President, in the exercise of his Executive power under the Constitution, may act through the head of the appropriate executive department. The heads of departments are his authorized assistants in the performance of his Executive duties, and their official acts promulgated in the regular course of business are presumptively his acts."

In Willcox vs. Jackson:

"The President speaks and acts through the heads of the several departments in relation to subjects which appertain to their respective duties."

In Confiscation Cases:

"A direction, given by the Attorney-General to seize property liable to confiscation under the Act of Congress, must be regarded as a direction given by the President. In Willcox vs. Jackson, 13 Peters, 498, it was ruled that the President speaks and acts through the heads of the several departments in relation to subjects which appertain to their respective duties."

In the United States vs. Tarden:

"Under the Tenure of Office Act, the President had the power at that time, which was during the recess of the Senate, to suspend the Collector until the next session of the Senate, and the act of the Secretary, as the head of the Treasury Department, is presumed to be the act of the President."

In Marberry vs. Madison, 5 U. S., 1st Cranch, 137:

By the Constitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character and to his own conscience. To aid him in the performance of these duties, he is authorized to appoint certain officers who act by his authority and in conformity with his orders.

"In such cases their acts are his acts, and whatever opinion may be entertained of the manner in which Executive discretion may be used, still there exists and can exist, *no power to control that discretion. The subjects are political. They respect the nation, not individual rights, and being intrusted to the Executive, the decision of the Executive in conclusive.*" (Italics ours).

In the letter of the Attorney-General James Speed to Honorable Wm. H. Seward, Secretary of State, dated November 13th, 1865, the Attorney-General said:

"Each of the Executive departments is, except where some special duty is directly imposed by Congress, under the immediate control and supervision of the President. What the department does must be regarded as having been done by the order and sanction of the President. As a general rule, no one can question the authority of the head of a department but the President."

The authority of the Executive officers of the United States to decide which of two contending factions in a State is the legally constituted government in such State, or which of two or more claimants to the Governorship therein shall be recognized as such Governor, is vested in such Executive officers by Section 4, Article 4, of the Constitution of the United States, which provides:

"The United States shall guarantee to every State in this Union a republican form of government, and shall protect each of them against invasion; and on application of the legislature or of the Executive (when the legislative can not be convened) against domestic violence;"

and by Articles 1, 2, and 3 of the Constitution of the United States, which create and fix the respective limits of the Legislative, the Executive, and the Judicial departments of the Government of the United States. As stated by Judge Treat, in his opinion in United States vs. 129 Packages, Fed. Cas., 15941, Vol. 27, page 288:

"Whatever power is vested by the Constitution in one department of the Government can not be usurped by another. If one should wholly refuse to act, or should undertake to divest itself of, or abdicate, its legitimate functions, it would by no means follow that another department, expressly limited to specified duties, would thereby acquire ungranted powers. The

abdication of Executive functions by the Executive, for instance, would not constitute the Judicial the Executive department of the country; nor would a failure or refusal of the Legislative to pass needed statutes ~~constitute the Executive the law-making. Each~~ ute constitute the Executive the law-making power. Each department has its true boundaries prescribed by the Constitution, and it can not travel beyond them. (U. S. vs. Ferrera, 13 How.) (54 U. S.) 40; Little vs. Bareme, 2 Cranch, (6 U. S.) 170."

The Executive department of the United States having, in the exercise of its power under the Constitution and laws of the United States, decided to recognize W. S. Taylor as Governor of Kentucky, and having so recognized him, that decision is binding upon all the courts, *and the question as to whether it was right or wrong can not be raised by any of said courts.*

Black's Constitutional Law, pages 83 and 241-4;
Luther vs. Borden, 48 U. S., 7 Howard, 1;
U. S. vs. Palmer, 16 U. S., 610;
Williams vs. Suffolk Ins. Co., 38 U. S., 415;
U. S. vs. Yorba, 68 U. S., 412;
Georgia vs. Stanton, 73 U. S., 50;
Jones vs. U. S., 137 U. S., 202;
Hamilton vs. McClaughry, 136 Fed. Rep., 445;
Sutton vs. Tiller, 98 Am. Dec., 471;
The Hornet, Fed. Cas., No. 6705.

But before making special comment on any of these cases, we would respectfully call attention to the purpose and scope of said Sec. 4, Art. 4, of the Constitution, and the extent of the power conferred thereby on Congress and the President in matters pertaining to State government and the title to persons claiming to be officers thereunder.

By that Section, the United States is vested with the power, and burdended with the corresponding duty, of seeing that in each State there shall be a certain kind of government, denominated as a republican form of government.

A government republican in form is defined as one

> "which is based on the political equality of men. It is a government of the people, for the people, and by the people." Black's Constitutional Law, page 239.

As said by the Supreme Court in Minor vs. Happersett, 88 U. S., 162:

> "All the States had governments when the Constitution was adopted. In all, the people participated, to some extent, through their representatives elected in the manner specially provided. These governments the Constitution did not change. They were accepted precisely as they were, and it is, therefore, to be presumed that they were such as it was the duty of the States to provide. Thus we have unmistakable evidence of what was republican in form, within the meaning of that term, as implied in the Constitution."

And in Duncan vs. McCall, 139 U. S., 449:

> "By the Constitution a republican form of government is guaranteed to every State in the Union, and the distinguishing feature of that form is the right of the people to choose their own officers for governmental administration and pass their own laws in virtue of the legislative power reposed in representative bodies whose legitimate acts may be said to be those of the people themselves; but, while the people are thus the source of political power, their governments, National and State, have been limited by written constitutions, and they have them-

selves thereby set bounds to their own power as against the sudden impulses of mere majorities."

As to the effect of this guaranty on the States themselves, the court also said, in Minor vs. Happerett, page 631:

> "The guaranty necessarily implies a duty on the part of the States themselves to provide such a government."

As to the power and duty conferred on the United States by the guaranty, Mr. Black says, on page 241:

> "In effect, the guaranty does not only contain a promise to each State that it shall continue to enjoy a republican form of government as long as the Union endures, but also imports a command to each State to maintain and preserve that form of government, under penalty of the intervention of the Federal Union, for the benefit of all its members."

This being the meaning of a government, republican in form, and the duty of the States and the United States to see that such a government exists in each State, what power can the Executive or political department of the United States exercise in the discharge of that duty? And, what power can that department exercise in the discharge of every necessary duty that may arise in the daily transactions of the United States Government with the officers of a State in case of an unsettled controversy relating to the government therein, or to the title of one of its officers?

An answer to this question is found in so much of Section 1 of said Article 2 of the Constitution of the United States as reads:

"The Executive power shall be vested in the President of the United States of America;"

and in so much of Sec. 3 of that Article as reads:

"He (the President) shall take care that the laws be faithfully executed."

This power is, of course, limited by sub-Sec. 18 of Sec. 8, Article 1, which vests the legislative department of the Government with the power

"to make all laws which shall be necessary and proper for carrying into execution * * * all * * * powers vested by this Constitution in the Government of the United States or in any department or officer thereof."

But, as to matters in relation to which the legislative department has in no way undertaken to legislate, the power of the executive department, when necessary to be exercised, must be exercised by the President, or heads of the departments, as he or they may determine.

In the case of Luther vs. Borden, 48 U. S., 7 How. 1, the court, in discussing the power vested in the executive department in matters pertaining to State governments said:

"Moreover, the Constitution of the United States, as far as it has provided for an emergency of this kind and authorized the general government to interfere in the domestic concerns of the State, has treated the subject as political in its nature and placed the power in the hands of that (political) department."

Going back to the table of cases cited above on the binding effect of a decision of the executive department,

the effect of such a decision is particularly illustrated by the exercise and effect of such executive power relative to foreign governments.

In the case of the United States vs. Palmer, it is held that when one part of a foreign nation separates itself from the old established government, and erects itself into a new and distinct government, the courts of the United States must view such newly constituted government as it is viewed by the legislative and executive departments of the government of the United States. In that case, the following question was certified to the Supreme Court:

> "Whether any colony, district or people, who have revolted from their native allegiance, and have assumed upon themselves the exercise of independent and sovereign power, can be deemed in any court of the United States an independent or sovereign nation or government, until they have been acknowledged as such by the government of the United States; and whether such acknowledgment can be proved in a court of the United States otherwise than by some act of statute or resolution of the Congress of the United States, or by some public proclamation or other public act of the executive authority of the United States, directly containing or announcing such acknowledgment, or by publicly receiving or acknowledging an ambassador or other public minister from such colony, district, or people; and whether such acknowledgment can be proved by mere inference from the private acts or private instructions of the executive of the United States, when no public acknowledgment has ever been made; and whether the courts of the United States are bound judicially to take notice of the existing relations of the United States as to foreign States and sovereignties, their colonies and dependencies."

In response the Supreme Court, by Chief Justice Marshall, said:

> "This court is of opinion that when a civil war rages in a foreign nation---one part of which separates itself from the old established government and erects itself into a distinct government---the courts of the Union must view such newly constituted government as it is viewed by the legislative and executive departments of the government of the United States."

In Williams vs. Suffolk Insurance Co., the question was whether the Falkland Islands constituted any part of the dominions within the sovereignty of Buenos Ayres. The judges of the Circuit Court of the United States being divided in opinion, certified to the Supreme Court the following question for decision:

> "Whether, inasmuch as the American government has insisted, and does still insist, through its regular executive authority, that the Falkland Islands do not constitute any part of the dominions within the sovereignty of the government of Buenos Ayres, and that the seal fishery at those islands is a trade free and lawful to the citizens of the United States, and beyond the competency of the Buenos Ayeran government to regulate, prohibit, or punish, it is competent for the circuit court in this cause to inquire into and ascertain by other evidence the title of said government of Buenos Ayres to the sovereignty of said Falkland Islands; and if such evidence satisfies the court, to decide against the doctrines and claims set up and supported by the American government on this subject, or whether the action of the American government on this subject is binding and conclusive on this court, as to whom the sovereignty of those islands belongs."

In answer the Supreme Court said:

"Prior to the revolution in South America, it is known that the Malvinas, or Falkland Islands, were attached to the viceroyalty of La Plata, which included Buenos Ayres. And if this were an open question, we might inquire whether the jurisdiction over these islands did not belong to some other part, over which this ancient viceroyalty extended, and not to the government of Buenos Ayres; but we are saved from this inquiry by the atttitude of our own government, as stated in the point certified.

"And can there be any doubt that when the executive branch of the government, which is charged with our foreign relations, shall in its correspondence with a foreign nation assume a fact in regard to the sovereignty of any island or country, it is conclusive on the judicial department? And in this view it is not material to inquire, nor is it in the province of the court to determine, whether the executive be right or wrong. It is enough to know that in the exercise of his constitutional functions he has decided the question. Having done this under the responsibilities which belong to him, it is obligatory on the people and government of the Union.

"If this were not the rule, cases might often arise in which, on the most important questions of foreign jurisdiction, there would be an irreconcilable difference between the executive and judicial departments. By one of these departments a foreign island or country might be considered as at peace with the United States whilst the other would consider it in a state of war. No well regulated government has ever sanctioned a principle so unwise and so destructive of national character.

"In the cases of Foster vs. Neilson, (2 Peters, 253, 307), and Garcia vs. Lee, (12 Peters, 511), this court have laid down the rule that the action of the political branches of the government, in a matter that belongs to them, is conclusive.

"And we think, in the present case, as the executive, in his message, and in his correspondence with the government of Buenos Ayres, has denied the jurisdiction which it has assumed to exercise over the Falkland Islands, the fact must be taken and

acted on by this court as thus asserted and maintained."

It will be noticed that, in this last case, the turning point was that *the Executive of the United States, in his message and correspondence with the government of Buenos Ayres, had simply denied the jurisdiction* which that government had assumed to exercise over the Falkland Islands. As to that denial, the court says, *it is not material, nor is it the province of the court to inquire, whether that denial of authority by the Executive was right or wrong.*

In the case of Hamilton vs. McClaughry, it became necessary for the court to decide whether there had been a formal declaration of war between this country and either the government of China, or the "Boxer" element of that government. The court said:

> "It is well settled that the existence of a condition of war must be determined by the political department of the government; that the courts take judicial notice of such determination, and are bound thereby."

In the case of The Hornet, the court refers to the said decision in United States vs. Palmer, and also the decision of the Supreme Court by the same learned judge in the case of The Divina Pastora, and says:

> "Whether a revolted colony is to be treated as a sovereign State, even *de facto*, is a political question and to be decided by the government, and not the court, has been decided in effect in several other cases than those before mentioned, as in Kennett vs. Chambers * * * and Clark vs. United States."

In Black's Constitutional Law, page 83, the author says:

> "The question which of two opposing governments, each claiming to be the rightful government of a State, is the legitimate government, is an illustration of the kind of question which the courts will refuse to decide, on the ground of their belonging to the political departments. So also is the question whether a state of war exists, or whether peace has been restored. And to this class belong questions relating to the government of a foreign country, as, what is its rightful government, whether the party in power constitutes a *de facto* government, what form of government obtains, and the like. The same is true of the question of admission of a State into the Union, and of the question of the extent of the jurisdiction of a foreign power."

This principle has been applied by the Acts of Congress to the sovereign states of the Union and Executive recognition of State government has been uniformly given by the courts the same effect as recognition of foreign governments.

The case of Luther vs. Borden grew out of a controversy in Rhode Island as to which of two governments was the rightful one----the Charter government, or the Constitutional government, headed by Thomas W. Dorr as Governor. During the existence of that controversy, the Charter Governor applied to the President for, and was granted, recognition; and the President

> "Took measures to call out the militia to support his authority if it should be found necessary for the Federal government to interfere, and, * * * it was the knowledge of this decision that put an end to the armed opposition to the Charter government."

Subsequently, Luther instituted an action of trespass against Borden and others for breaking into his house. The defendants justified upon the ground that during the existence of the aforesaid controversy, there was an insurrection in the State; that plaintiff was engaged in that insurrection; that the defendants, being in the military service of the State, entered plaintiff's house and searched, by command of their superior officer, for plaintiff to arrest him.

A recovery in the suit was sought upon the theory that the Constitutional government was the legal government, notwithstanding the action of the President. The Circuit Court held that the Charter government and laws, under which the defendants acted, were in full force and effect and the paramount laws of the State, and constituted a justification of the acts of the defendants. The correctness of that decision was the question involved on the writ of error in the Supreme Court, which held, among other things, that:

> "The interference of the President, therefore, by announcing his determination, was as effectual as if the militia had been assembled under his orders, and it should be equally authoritive, for certainly no court of the United States with a knowledge of this decision would have been justified in recognizing the opposing party as the lawful government; or in treating as wrong doers or insurgents the officers of the government which the President had recognized and was prepared to support by an armed force. In the case of foreign nations, the government acknowledged by the President is always recognized in the courts of justice, and this principle has been applied by the Acts of Congress to the sovereign States of the Union."

The decision in last-cited case was referred to in Taylor vs. Beckham, 178 U. S. 548, in the following language:

> "In that case, it was held that the question, which of the two opposing governments of Rhodes Island, namely, the Charter government or the government established by a voluntary convention, was the legitimate one, was a question for the determination of the political department; and when that department had decided, the courts were bound to take notice of the decision and follow it."

This reference was to a case seeking to go behind, and in a collateral way question the correctness of, the decision of the Supreme Court of the State and the decision of the President of the United States, as to which was the lawful government in Rhode Island. The court held that neither could be questioned in that way.

Similar reference was also made by the Supreme Court to that decision in Duncan vs. McCall, 139 U. S., 449.

In the case of The Hornet, District Judge Brooks also refers to it and says:

> "In the great case of Luther vs. Borden, than in the argument of which the great American constitutional lawyer rarely, if ever, displayed more learning, the Supreme Court unmistakably declared against the view urged by Mr. Webster, that the Federal courts have no jurisdiction of the question, whether a government organized in a State is the duly constituted government in the State. That is a question which belongs to the political, not to the judicial power. In that case, any disposition of that question could not have disturbed our relation with any established foreign power. No power, with whom the United States was at peace, or to whom

> our government was solemnly pledged to a just and clearly prescribed course, as by our neutrality acts, could or would have complained of a contrary decision in that case, and still that was held not to be a question with the court."

A careful study of the opinion in the Luther-Borden case, and all opinions referring to it, will show the prominent and ruling feature of each to be that part which holds that the action of the President in recognizing the head of the Charter government as the Governor of the State was binding on all the courts and its correctness could not be even questioned by any of them.

In the case of United States vs. Yorba, 68 U. S., 412, 17 L. Ed. 635, the Supreme Court held itself to be bound by the action of the political department of the government, in designating July 7, 1846, as the day when the conquest of California was completed and the Mexican officials were displaced.

The case of Georgia vs. Stanton was an effort, by suit filed in the Supreme Court of the United States, to restrain the defendants, the Secretary of War, the General of the Army, and Major-General Pope, from acting under orders of the President, from issuing any orders, or permitting any act within or concerning the State of Georgia, under certain Acts of Congress. A motion was made by counsel for the defendants to dismiss the bill for want of jurisdiction. That motion was sustained. The court said, among other things:

> "It is claimed that the court has no jurisdiction either over the subject-matter set forth in the bill or over the parties defendants. And, in support of the first ground, it is urged that the matters involved and presented for adjudication are political and not

judicial and, therefore, not the subject of judicial cognizance.

"This distinction results from the organization of the government into the three great departments, executive, legislative, and judicial, and from the assignment and limitations of the powers of each by the Constitution.

"The distinction between judicial and political power is so generally acknowledged in the jurisprudence, both of England and of this country, that we need do no more than refer to some of the authorities on the subject. They are all in one direction. N. Y. vs. Conn., 4 Dall. 4; Nabob of Carnatic vs. E. I. Co., 1 Ves. Jr., 375; S. C. 2 Ves. Jr. 56; Penn vs. Lord Baltimore, 1 Ves. Tr. 446, 447; Cherokee Nation vs. Georgia, 5 Pet., 1."

Sutton vs. Tiller was decided by the Supreme Court of Tennessee. Sutton was a captain in the United States army, in command of a post at Jacksboro, Tenn. Tiller was brought before him.

> "Some words arose when the plaintiff in error (Sutton) took the pistol in controversy from the defendant in error (Tiller), alleging that it was government property."

The action was to recover the value of the pistol. The case originated before a justice of the peace, but was tried before a circuit court of the State. At that trial,

> "the circuit judge instructed the jury, in substance, that the question whether or not such a flagrant state of war existed at the time and place as would authorize the plaintiff in error, in the exercise of his duties as commander, to take the pistol for the use of the government, was a question for their determination."

Of this instruction the Supreme Court of Tennessee said:

"This is erroneous. The question whether or not war in its legal sense existed is to be determined alone by the political power of the government, and of this determination the courts must take judicial knowledge. It is not a question that can in any event be left to a jury. The President of the United States by proclamation of April, 1861, and the Congress by Act of July, 1861, had recognized the existence of war, and had declared Tennessee to be one of the States in insurrection and rebellion. The court should have instructed the jury that war existed and that the military authorities of the United States were properly holding the post at Jacksboro, it being part of the insurgent territory, and that if the plaintiff in error as an officer of the United States service was in command of that post, then he had the right to exercise all the discretionary powers of a commander coming within the scope of his military duty."

See also Fed. Cas., Nos. 14501, 14254 and 15941.

These authorities are all one way, and they leave no ground for dispute. In addition to establishing the principle that the decisions of the executive department are not subject to review or question by the judicial tribunals, they establish the still further principle that when, for any reason, a decision of the executive department is made, the *fact* fixed by that decision binds and must govern the judicial tribunals in all cases involving the same fact, even though there be not the remotest connection between the cases in such tribunals and the one decided by the political department. This is clearly shown in Williams vs. Insurance Co., *ante*. That case was an action in the U. S. Circuit Court of Massachusetts to recover from the insurance company losses on the schooners, Harriet and Breakwater, which had been insured by said company. Both of these vessels, bound on a sealing voy-

age, proceeded to the Falkland Islands, where they were seized by one Lewis Vernet, acting as Governor of those islands under the appointment of the government of Buenos Ayres. They were seized on the claim that the islands composed part of the dominions of the government of Buenos Ayres, and that, therefore, the parties in charge of them were without authority to fish there for seals. On the trial there was evidence that the United States, through its regular executive authority, had contended and was still contending that the claim of the Buenos Ayres government was not well founded. The point was made before the trial court that this mere contention by the executive authority precluded the court from going into the question as to whom the islands did belong. On that point the judges of the circuit court were divided in opinion. Thereupon they certified to the Supreme Court the question hereinbefore copied, the substance of which was, inasmuch as the American government contended as above stated through its executive authority, was it competent for the circuit court to inquire into and ascertain by other evidence the title of Buenos Ayres to the sovereignty of said islands? To the question the Supreme Court made answer in the negative, as cited.

To the same effect is Jones vs. United States, *ante*. Henry Jones was indicted in the U. S. District Court for the District of Maryland for murder, committed at Navassa Island. The indictment was based upon the alleged fact that said island was under the exclusive jurisdiction and within the possession of the United Sates, and out of the jurisdiction of any particular State or District

thereof. The indictment also charged that the District of Maryland was the district into which the defendant was first brought from said island.

> "At the trial, the United States, to prove Navassa Island was recognized and considered by the United States as appertaining to the United States under the provisions of the laws of the United States in force with regard to such islands, offered in evidence certified copies of papers from the records of the State Department of the United States."

These papers showed that for certain reasons the executive authority claimed that said islands belonged to the United States. On the trial, the court held that the claim of the executive authority precluded it from inquiring further into the ownership of said island. The defendant was convicted and sentenced to death, and he sued out a writ of error from the Supreme Court, which held that the trial court was correct in holding itself bound by said action of the executive authority.

In the first of these cases, the liability of the insurance company was fixed on the action of the executive department of the United States in a matter that had no reference to an insurance policy. In the second, a death penalty was affirmed on the claim of the executive department that Navassa Island belonged to the United States----a claim having no reference whatever to the crime of murder.

So, in the case at bar. The President decided to, and did, recognize W. S. Taylor as the Governor of Kentucky; that recognition existed at the time the pardon was issued. That said recognition conclusively binds every court of the United States in every case involving the

question as to who was the Governor of Kentucky at that time, we earnestly contend. The correctness of our position can be illustrated by supposing that the postmaster at Frankfort should be indicted for delivering the mail to the wrong person. He would make a complete defense by calling attention to the fact that at the time he so delivered the mail, the person to whom he delivered it, W. S. Taylor, was recognized by the President of the United States as the Governor of Kentucky. The case at bar involves the same question as in the supposed indictment. Is it not true that the same fact that would bind the court in the supposed case, binds it in this case? And does it not necessarily follow that this Honorable Court is now bound to hold that W. S. Taylor was, at the time he granted said pardon, the legal and actual Governor of the State of Kentucky, and that a denial of that fact by the State is a denial to appellee of the equal protection of the laws?

In Jones vs. United States, 137 U. S. 202, 34 L. Ed. 691, the court said:

> "Who is sovereign *de jure* or *de facto* of a territory is not a judicial, but a political question, the determination of which the legislative and Executive departments of any government conclusively binds the judges as well as all other officers, citizens, and subjects of that government. This principle has always been upheld by this court, and has been affirmed under a great variety of circumstances."

CONCLUSIONS.

From the foregoing citations, this court has decided:

1. That, in extradition proceedings, the unlawfulness of an arrest may be inquired into, in a State or Federal court;

2. That Federal courts recognize and enforce State pardons;

3. That, in the absence of controlling enactment to the contrary, the common law of England determines the validity and effect of a pardon, in State and Federal courts; therefore,

4. That a State adjudication upon the validity of a pardon involves general principles of law, common to all courts, and is therefore not followed in Federal courts;

5. That if a State decision upon a purely local question denies equal civil rights, it will not be followed in Federal courts;

6. Federal recognition of a State government is conclusive, and controls all courts, State and Federal.

We conclude, and respectfully ask, that the appeal herein be dismissed, and the writ of *mandamus* denied.

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